United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

Original

76-7408

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7408

G. T. FLAMMIA,

Plaintiff-Appellee,

—against—

O. S. G. TAP AND DIE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of New York

JOINT APPENDIX

[Volume III—Pages 401A to 606A]

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MR. LEDWITH: Objection, your Honor, as a result of that conversation.

THE COURT: Yes, I will sustain that.

MR. LAMBERTON: No, I said as a result of the meeting Mr. Demery had left.

THE COURT: I sustained it in that form. You can say did there come a time, did Mr. Demery leave and,if so, when?

MR. LABERTON: What I am asking is --

THE COURT: I understand what you are saying. And he is objecting to anything that might have been said or the inference therefrom.

MR. LAMBERTON: I am asking him about the connection, your Honor, after this meeting did Mr. Demery leave.

THE COURT: All right. Did there come a time when Mr. Demery left.

Q What was the date of the first meeting, Mr. Brancato?

THE COURT: June 11th.

A June 11th.

Q What was the date of the second meeting?

A Approximately the 18th or 19th. It was about 10 days or so thereafter.

Q Well, was there a discussion at the second meeting of Mr. Demery's employment?

A Yes. There was at both meetings, as a matter of fact.

Q After the second meeting do you know whether Mr. Demery flew to Chicago?

A Yes.

Q To talk with O.S.G.?

MR. LEDWITH: I object. Oh, I withdraw the objection.

Q Can you tell me when the letter of intent was signed, Mr. Brancato?

A June 27th.

Q When was the purchase agreement, the stock purchase agreement, prepared?

A Immediately thereafter. One followed the other.

Q During the month of June?

A Yes.

Q So that both the letter of intent and the stock purchase agreement were in at least -- I am sorry -- the letter of intent had been signed in June, is that correct?

A Yes.

Q And the stock purchase agreement had been

drafted in June?

A Yes.

Q When was the closing of the stock purchase agreement?

A August 1.

Q Was it signed in August --

A No, it was signed to my recollection -- gee, I don't recall the date it was signed.

THE COURT: Do you mean you got your lawyers who drew up an agreement in three days and then waited for a month?

A Well, there was certain requirements that had to be satisfied at the closing.

THE COURT: I think we will take a luncheon recess.

MR. LAMBERTON: I have about three or four more questions, your Honor.

THE COURT: If it is only that, but then we will have to come back for the cross-examination anyway.

MR. LAMBERTON: All right, your Honor.

MR. LEDWITH: If he wants three more questions, your Honor, I won't have any cross.

THE COURT: He will take three or four more and

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then we will start again after lunch -- oh, you won't have any cross? All right, go ahead then.

BY MR. LAMBERTON:

Q Now, did you receive a letter from Mr. Flammia with respect to a proposed finder's fee to be paid by Mite Corporation?

A Yes, I did.

Q Did you respond to that letter?

A Yes, I did.

Q I would like to show you PX-12 and ask you if that is your response?

A That is my response.

(Continued on next page.)

Q Well, did you know at that time what transactions were taking place between O.S.G. and Mr. Flammia?

A I did not.

Q Now, Mr. Flammia testified several days ago, and let me read you the questions and answers first of all:

"Question: First of all if you can tell the Court when did that conversation take place? When was the conversation held and what was said by each of you?

"Answer: I called Mr. Brancato. I am not sure whether I got him at his home or at his office. And we discussed this particular letter. And Mr. Brancato said to me that it was his understanding that I was going to be a participant and a part-owner of the O.S.G. Tap and Die, and that I was going to be the president of the Sossner Tool Division again. And that he felt that a finder's fee was not in order because I was going to be employed by this particular company.

"And I felt that Mr. Brancato was a fair and honest person and that evidently O.S.G. had told him this."

Did you tell Mr. Flammia at that time that you understood that he was to be a participant and part-

owner of the O.S.G. Tap and Die Company?

A No sir.

Q Did you have any idea what his relation was at that time with O.S.G. Tap and Die?

A I did not.

Q Did you tell him that you understood that he was going to be president of Sossner again?

A No sir.

Q And that you felt that a finder's fee was not in order because he was going to be employed by that company? Did you tell him that?

A No sir.

MR. LAMBERTON: I have no further questions.

MR. LEDWITH: No cross, your Honor.

THE COURT: All right, we will adjourn until 2:15.

(At 1:05 o'clock p.m. a luncheon recess was thereupon taken until 2:15 o'clock p.m.)

THE CLERK: Civil cause on trial, Flamia versus Mite Corporation.

THE COURT: What do you have left to do, your expert and one other witness?

MR. LAMBERTON: Our witness and Mr. Osawa, the president of the corporation.

THE COURT: Which do you want to put on first?

MR. LAMBERTON: We want to put on our expert, your Honor.

THE COURT: Mr. Osawa was planning on getting back to Japan?

MR. LAMBERTON: We would hope so.

THE COURT: I cannot sit beyond 5:00. I don't know if you are going to get all of this in in three hours.

MR. LAMBERTON: We will do our best, your Honor.

THE COURT: I'll leave it up to you.

MR. LAMBERTON: At the outset, your Honor, I would like to, under Rule 3, move the admission of Mr. Robert A. Dean of the firm of Rockman and Roderfeld in Chicago, Illinois for the purposes of this case. Mr. Dean is the personal counsel for Mr. Osawa.

THE COURT: Glad to have you here.

MR. DEAN: Very nice to be here.

MR. LAMBERTON: We would like to call to the stand Mr. Alan Sternlieb.

A L A N S T E R N L I E B , called as a witness on behalf of the defendant, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAMBERTON:

Q Mr. Sternlieb, what is your occupation?

A I am an investment banker, sir.

Q With what firm?

A Lehman Brothers.

Q What is your status in that firm?

A I am the managing director of Lehman Brothers.

Q Can you give us a description, briefly, of your educational background?

A After high school I attended the Ammers College where I graduated cum laude and phi beta kappa.

Q When was this?

A I was in the Class of '49. I then went to Harvard Business School where I received a M.B.A. with distinction and with a banker scholarship and received another award.

Q What was the other award?

A An award for performance in retailing.

Q Did you serve in the Armed Forces?

A Yes, sir. I spent twenty-one months as an officer in the United States Air Force.

Q What were you doing there?

A I was a management analyst officer.

Q When did you get out of the service?

A I would say it was about August. I'm not sure of the exact date, of 1953.

Q What was your business experience after that?

A After that I worked for a chain of shoe stores and then worked in a family business which manufactured boys' clothing.

Q What was your position in the family firm?

A Well, I was an officer in the firm and eventually president and I sold my interest in the firm at the end of 1959.

Q What did you do then?

A I became associated with Lehman Brothers in 1960.

Q Have you been associated with Lehman Brothers since then?

A Yes, sir.

Q Are you a partner of Lehman Brothers?

A We have a partnership and a corporation, yes. I am a partner and managing director.

Q Describe your experience with Lehman Brothers and particularly in relation to the mergers and acquisitions?

A I spent a good deal of time in the area of mergers and acquisitions. In large part related to small family businesses in terms of selling them and assisting them and achieving equity.

Q Could you tell us approximately how many mergers and acquisitions you investigated over that period of time?

A Oh, I can't guess at the number. It must be in excess of a hundred and I'd say I closed in excess of twenty.

Q Have you participated in mergers and acquisitions in the one to twenty million dollar range?

A Yes, sir.

Q Are you familiar with the fees customarily paid to persons or firms who assist the principals in such acquisitions?

A Yes, sir.

Q Mr. Sternlieb, will you at this time assume the following facts to be true and accurate: The plaintiff Gerald Flamia graduated from high school in 1935 and began a career in the tap and dye industry in 1937. He started with Sossner Tap and Tool Company as its factory superintendent in

1948. In 1952 he purchased ten percent in the shares of the company and became its vice-president and fifteen years later in 1967 he became Sossner's president. In 1967 the LaCoyle Corporation purchased Sossner, including Mr. Flamia's shares and retained Mr. Flamia under a three-year contract to be the president of the company. But reduced his annual salary from $45,000 to $35,000 a year.

In 1970 Mite Corporation purchased the Sossner Tap & Tool Company and Mr. Flamia remained on as president of Sossner at the same salary, 35,000 a year.

He remained at that salary until 1972 when he participated in a sales incentive program in addition to his annual wages he received $5,000 in incentive payment for that year. During his period with Sossner, Mr. Flamia was most active in the design and manufacturing areas. During this period he relied upon Mite for financing and account support in his activity at Sossner. The American tap industry is relatively a small one and makes approximately $100,000,000 a year. There are five or six large companies or twenty or twenty-five smaller ones in the industry. Sossner is one of the smaller sized companies in the tap field.

It has a good reputation. From 1948 to 1967 while Mr. Flamia was first an employee and then a vice-president of Sossner, Sossner had grown from a company of sales

of approximately 125,000 and twenty-five employees to a company with gross sales of 1.9 million and a working force of ninety-nine.

During the six-year period while Mr. Flamia was president, from 1967 to 1973, Sossner's sales growth flattened out, rising only from 1.9 million in 1967 to 2-million in 1973. During its fiscal year ending February 28, 1973, Sossner had sales of $2,045,000 and showed a net loss of $4,223.

In 1972 Mr. Flamia advised Mite's executives they needed an influx of capital greater than that had been provided in prior years. He believed Sossner would become stagnant. Mr. Flamia was also concerned for his own personal situation and he advised Mite that he wasn't too secure. He would have a position in Sossner in future years. Mr. Flamia was then advised by the executives of Mite that in order to resolve Sossner's problem he might wish to purchase Sossner. He was advised by Mite's executives vice-president he should contact his attorney and his accountant in order to put together a plan for such a purchase.

Mr. Flamia then met with his advisors and upon reviewing the various data he made available to them they recommended an offer of 1.6-million for the purchase of Sossner.

Mr. Flamia advised Mite of this fact, but Mite advised them that Mite wanted as the purchase price the amount of its investment in the company which amounted to approximately $2-million. Mr. Flamia consulted with his advisors who also recommended a $1.6-million offer for Sossner. Thereafter, the negotiations terminated and Mr. Flamia resigned as president of Sossner March of 1973.

After resigning, Mr. Flamia knew Sossner could be purchased, provided Mite got its purchase price of $2-million and could be met. He contacted three different companies and advised them of the $2-million purchase price of Sossner.

Two of these companies reviewed it and decided the price was too high and turned it down. The other company was still considering the matter. That was O.S.G. Tap & Dye Inc. Mr. Flamia also formed his own corporation known as the Pioneer Tap Company. He went to a convention in May, 1973 and while there visited the office of O.S.G. Tap & Dye Inc. in a Chicago suburb.

Mr. Flamia was aware that O.S.G. was a Japanese company which produced taps and the purpose of Mr. Flamia's visit to O.S.G. was to investigate the possibility of buying simply buying unfinished taps. He would then finish himself under his own brand name.

During Mr. Flamia's visit to O.S.G., personnel including Robert Zoppelt, vice-president for sales at OSG, had lunch with Mr. Flamia and Mr. Zoppelt discussed Mr. Flamia's plans for his own company and OSG's ability to supply him with taps or tap blanks.

Mr. Flamia indicated a desire of becoming president of Sossner. Mr. Flamia suggested to Mr. Zoppelt that OSG give serious consideration to acquiring Sossner. In doing so, Mr. Flamia had no intention of acting as a finder. When Mr. Flamia raised the subject, Mr. Zoppelt called Mr. Osawa. Mr. Perri Osawa, president of OSG and Mr. Flamia and Mr. Zoppelt went to his office.

Again a discussion then ensued about whether OSG was interested at that time in the general manufacture of taps in the United States. Mr. Flamia indicated that he thought during the course of the conversation, that he though Sossner was still at the asking price of approximately $2-million. He participated in discussions and the question as to whether or not if Sossner was available for sale and if OSG had an interest in acquiring it.

Mr. Flamia might resume employment with that corporation. During the general conversation Mr. Flamia said they should talk to Mite Corporation to see whether Sossner was available in fact, for sale. Mr. Flamia then telephoned

Mr. Bronco, executive vice-president of Mite and inquired as to whether or not Sossner was for sale.

Mr. Bronco said he would have to mull the question over. In a telephone discussion the next day, Mr. Flamia told Mr. Zoppelt he had not given Mr. Bronco OSG's name and Mr. Zoppelt told Mr. Flamia he objected to having Mr. Bronco not informed of the fact that OSG was the interested company.

Mr. Flamia called Mr. Bronco and advised them that OSG was the interested party.

Mr. Flamia then addressed a letter to Mr. Bronco to confirm his discussion and providing the names of OSG and Mr. Zoppelt to Mite.

OSG then wrote to Mr. Flamia asking to be kept informed of Mite's response. In fact, Mite never did get in touch with Mr. Flamia about the proposed sale of Sossner, but got in touch directly with OSG.

Mr. Flamia did address a subsequent letter to Mite Corporation saying that he thought he might be entitled to a finder's fee for what he had done, but Mite responded to Flamia he had not been authorized to act in any way on its behalf.

Further negotiations for the sale of Sossner by Mite took place directly between the sale of Sossner by

Mite to OSG, it took place directly between the executives of the companies concerned.

After a telephone conversation between Mite and OSG on May 30, 1973, Mite sent OSG a pro forma balance sheet and profit and loss statements for Sossner Company, fiscal year ending February 28, 1973.

The profit statement showed a loss for the fiscal year '73, '74 of $4,223 and a gross sales of $2,045,000.

With this initial submission of financial data, Mite stated it wanted to recover from any sale of Sossner the Mite investment in that corporation. Namely the odd total sum of $2-million.

Shortly thereafter Mr. Flamia submitted a forecast of Sossner's operations to Mr. Zoppelt. This forecast reviewed Sossner's operations during the fiscal years, fiscal year ending February 28, 1973 and included a projected statement of operation for fiscal year 1974. Capital requirement for 1973, '74 and projected five-year sales and profit goals.

There was little or no discussion of this document between Mr. Flamia and OSG.

(Continued next page.)

Q On June 13, 1973, Mite sent OSG an audited statement of Sossner's income and expenses for March and April of 1973 and a schedule of Sossner's plant property and equipment as of February 28, 1973. While Mr. Flammia had himself tried to purchase Sossner for one million six hundred thousand dollars and believed that 1.6 million was a fair price, he concluded that OSG was justified in paying a twenty-five per cent premium over this price because of the yen-dollar exchange rate, despite the fact the proposed transaction was a dollar transaction.

Thereafter, the acquisition negotiation between Mite and OSG continued without any participation by Mr. Flammia After further negotiation between the executives of the two companies and their lawyers, on June 27, 1973, a letter of intent was signed by those two corporations, whereby OSG agreed to acquire Sossner or Mite for a price of two million dollars.

OSG later offered Mr. Flamia the position of Vice President in charge of Manufacturing at Sossner, but believing the one-year contract term offered was too short. Mr. Flammia rejected that offer.

After assuming these facts and having reviewed the financial statements exchanged between the parties, do you have an opinion as to the value of the services rendered

by Mr. Flammia in connection with the acquisition of Sossner by OSG from Mite?

MR. LEDWITH: Objection, your Honor.

THE COURT: Let me have the specifics of your objection. I think I have one or two in mind.

MR. LEDWITH: Yes. I will object to counsel's hypothetical question in three areas. The first has to do with the conversations between Mr. Flammia, Mr. Zoppelt and Mr. Osawa, on or about May 14, 1973 in which counsel in his question stated that the discussions involved the possible acquisition of Sossner by OSG and the fact that Mr. Flammia indicated the purchase price would be two million dollars and if the deal was possible that Flammia might resume employment with Sossner.

Your Honor, I object on the ground that in order to have an accurate opinion given the complete conversations should be included in the hypothetical and it should include the fact that Mr. Flammia was requested and agreed to invest the sum of $100,000 in an acquisition.

THE COURT: I understand. Isn't that something his version of the conversation is one way and your version of the conversation is another way, as I

recall it. I might be wrong. Isn't that something you could put together, one or two of these others to the witness on cross-examination and see if his opinion should change? If you adopt certain slightly different assumptions?

MR. LEDWITH: I certainly could do it that way.

THE COURT: I understand your objection. I think that is one portion, at least I can take for the purposes of the hypothetical. I can take Mr. Lamberton's version. That is not to say I will or will not adopt it as a finding of fact in my ultimate conclusion, by taking it that way. He may not be getting the full value of his expert's opinion. He may have an alternate hypothetical. I don't know.

MR. LEDWITH: That is one. Your Honor's ruling will probably be the same, but I will state it for the record.

THE COURT: Certainly.

MR. LEDWITH: The facts given in the hypothetical relative to the presentation of the brochure in the forecast and the proposed statement.

THE COURT: It is your position that it was given at the initial meeting and it is his position it was given some time later in the end of June, as I

recall.

MR. LEDWITH: Yes. The third objection should have a different ruling.

THE COURT: Also the discussion with respect to the consideration given to them?

MR. LEDWITH: Yes. However, on the third objection the ruling should be different. In which the fact was given that Mr. Flammia knew the fair purchase price to be 1.6 million dollars. He thought that a twenty-five per cent premium --

THE COURT: I don't remember any testimony to that effect.

MR. LAMBERTON: Your Honor, if I look at the transcript, page 211, I believe it is on page 211 when Mr. Flammia testified he thought $2 million was justified because of the exchange rate. While I thought that 1.6 million was a fair price and merely taking 400,000 and 1.6 million, that turns out to be a twenty-five per cent premium.

MR. LEDWITH: I quarrel with that fact. Mr. Flammia did in fact say that, but the word premium, the term premium is being used in the context to characterize it, it is an error.

THE COURT: What date was this conversation

alleged to have taken place?

MR. LAMBERTON: Mr. Flammia's testimony, he indicated on --

THE COURT: When did he indicate he had this discussion, do you recall?

MR. LAMBERTON: It's on page 211, your Honor.

THE COURT: I understand. What date is that conversation? When did that conversation take place?

MR. LAMBERTON: It's on page 211, your Honor.

THE COURT: I understand. What date is that conversation? When did that conversation take place?

MR. LAMBERTON: Mr. Flammia did not say. But I asked, "Did you point out to OSG" --

THE COURT: I see that.

MR. LAMBERTON: "What did OSG say to that" and I believe we're entitled to take Plaintiff's statement in a hypothetical question. If he wishes to repudiate that, now that is another matter.

THE COURT: He is saying he objects to the use of the word premium. I assume this conversation took place in May, as you say. Let's assume the conversation is some time between May and July.

Mr. Sternlieb, it took place between representatives of OSG and Flammia. To the following

extent, the question was asked of Mr. Flammia, did you point out to OSG that you tried to purchase this, meaning Sossner on several occasions for a million point six.

"Answer: Yes.

"Question: What did OSG say to that?

"Answer: They didn't. I think I also indicated that these, due to the rate of exchange prevalent at the time, if I paid two million, they would be getting it for the equivalent of 1.6 million, which I thought was a fair price.

"Question: If it were a yen purchase?

"Answer: That's right.

"Question: But in dollars it was still two million?

"Answer: That's right."

Assuming that was Mr. Lamberton's question, the way it was put to you?

MR. LEDWITH: Thank you.

THE COURT: With that qualification I'll allow the question. Bear in mind, Mr. Lamberton, what I said about the two versions of the other conversation with respect to the acquisition conversation and the brochure. I don't know whether you want to post a

second hypothetical to him or not. I will let him answer on the basis of this.

Do you have an opinion?

MR. LAMBERTON: I understood you to overrule Mr. Ledwith?

THE COURT: I did. Then how did the question end up? Did you have an opinion?

Q Do you have an opinion as to the value of the services rendered by Mr. Flammia in connection with the acquisition of Sossner by OSG from Mite?

A Yes, sir, I do.

Q What is the value, Mr. Sternlieb?

A I would say the value is in the ballpark, twenty to twenty-five thousand.

Q Please state the reasons for your opinion as to the value of Mr. Flammia's services?

A If I may, I would like to explain how we undertake the work in merger and acquisition at Lehman Bros. As I understand, it is done by a number of other firms on Wall St. who work in this field --

MR. LEDWITH: I will object to that since we're not dealing with a Wall St. firm, acting in the business market.

THE COURT: I would prefer if you could enumerate

your reasons rather than to explain the background for them. If you have specific reasons for reaching a twenty to twenty-five thousand dollar value?

THE WITNESS: Your Honor, I would like to, if given permission, to point out what type of fee arrangements Lehman Bros. would receive for a transaction of this type. What type of services we would render and the type of arrangement we would make with someone who was instrumental in bringing a transaction of this type to our attention.

THE COURT: That is the only basis on which you can answer the question?

THE WITNESS: That would be the prime basis on which I would answer the question.

Q Are you familiar with the practices of other companies, partnerships, which are active in this area?

MR. LEDWITH: I will object to that, your Honor.

THE COURT: No, I will allow it. This is as I indicated to you, gentlemen, before we adjourned the last time, this is perhaps one method of evaluation. It's not necessarily the exclusive method of evaluating, but it is some evidence of evaluation for services. Whether it all goes to the question of weight to be given, whether it is a hundred per cent or ten per

cent weight, that is something I am going to have to determine based on what the witness says.

Q Would you go ahead, Mr. Sternlieb?

THE COURT: Are you familiar with other methods?

THE WITNESS: Yes.

Q Would you continue your answer as to what Lehman Bros. does and we can then discuss whether these are comparable expenses with other firms.

A Well, what we attempt to do is to work on an exclusive basis with any firm that we are representing in terms of their selling, merging or divesting a division. Our purpose of doing this is because we want to have the ability to one, understand the goals and objectives of the owners of the business. Understand what they want to accomplish.

The next step, assuming that we decide the step, we attempt to learn as much about the business as we can, before we get into any great understanding of its aims and efforts. We insist upon this exclusive arrangement so that we don't spend a lot of time without any possible reward.

Then we study the business quite carefully. Our procedure is to prepare a detailed memorandum with the assistance of the selling parties describing the business, explaining the history of the business, showing financial statements for a minimum of five years, assuming they are

available and readily obtainable. Explain the reasons why there might be differences in the various ratios, such as a gross profit of selling, expenses, percentage of profit as a result of sales. We examine the balance sheets and there are a number of examinations, what is happening to inventories. We look at the return on the investment and we attempt to come up with a document that is a fair and accurate description of the business.

During the time that we're doing this, we attempt to understand the industry to the best of our knowledge and come up with a list of potential acquirers for the particular operation that may be available for sale. We use the services of more than one individual. The services of a number of people are brought to bear in such a situation.

Having prepared this list and having completed a memorandum which is acceptable both to Lehman Bros. and to the prospective sellers, we go over the list and we arrange them in order of potential, as to which ones we might approach first and so on. We make discreet inquiries at the top level of these companies and attempt to ascertain an interest. Assuming we were to ascertain an interest, and proceed, we would negotiate on behalf of our client to attempt to achieve a successful transaction.

Lehman Bros. in a transaction of the size that

we're referring to here, the fee would be in the magnitude of five per cent of the first million dollars, four per cent of the second million dollars, three per cent of the third and so on. We have recently changed our fee schedule to the effect that it is five per cent for the first two million dollars, four per cent for the next two million, so in a transaction of this type, we have performed a great deal, we have used a great deal of time and hopefully performed a valuable service, we would receive ninety or a hundred thousand dollars. If that transaction was brought to our attention by another individual who we may call a finder, depending upon the relationship he had with the transaction and how well he had it in hand and how constructive he was in assisting us to the conclusion of the transaction, we would agree to pay him in the percentage related to our fee.

That percentage could vary from five per cent up to twenty or twenty-five per cent. It would depend on the amount of time and effort, investigation. Some transactions may take a year or two to consummate or some are done quite quickly. In the light of the facts as I understood them to be presented, I would say some services were derived and therefore Mr. Flammia would be entitled to the higher end of that arrangement.

(continued next page

:s/ss
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A He did not according to the question, as I understood it, perform the type of services as to the extent we would have performed them, bring to bear the number of people and the amount of effort involved and as a finder would have received from Lehman the high end of that scale and that is how I could come to the amount I mentioned.

Q When you say Lehman Brothers, you bring to bear a great many people. What kind of people are you referring to?

A There would be perhaps one or two associates of the firm who would visit the plant. Obtain information. I would discuss it with other partners of the firm. We would take into consideration the various tax implications of a transaction. If it is a family-owned business, this might be particularly important. If it is a transaction where the payment is to be received in security, he would want to analyze the securities to make sure they are of value and not likely to go down in price.

MR. LEDWITH: Your Honor, excuse me. I will object to all of this. Since it is in no way related to the hypothetical which was presented by counsel.

THE COURT: That is for me to determine.

MR. LEDWITH: It also doesn't exist in the case.

THE COURT: That is for me to determine.

Q Have you concluded your answer?

A We would check with our internal counsel or our internal tax people as well as dealing with our clients, experts as well.

Q Would it change your opinion, Mr. Sternlieb, if the forecast for 1973, 1974, which I believe you have reviewed, would it change your opinion if that were delivered to OSG Corporation on May 14th rather than sometime early in June, taking into account the letter of intent was signed, entered into between the parties on June 27, 1973?

A Well, the forecast itself was not delivered by the company as I understand it.

Q The assumption you are to make is it was delivered by Flamia to OSG who is the potential purchaser. It was not delivered by Mite Corporation.

A Well, a forecast is something that is subject to question and any time there is a forecast, when we're involved in any transaction, we attempt to support it with documents. I don't think timing is of a critical nature as long as the prospective acquiror knows what he is looking into.

Q What kind of financial documents and preparation in preparing financial documents do you rely upon primarily

in the presentation to a possible buyer?

A Well, a number of things that I've already mentioned. Five-year profit and loss statement, complete analysis of them. An analysis of costs, goods sold, what is the key to success in this business, in terms it is a manufacturing expertise. Is it selling expertise. How many customers are there. Who are the ten largest customers. How many years have you sold to them. What percentage of sales, what risks do you run if you lose the first five. These are just a few of them.

Q Are these historical documents?

A Yes, sir.

Q Based upon recorded data?

A Those are usually available when we prepare a memorandum, discussing the business to make it as complete as possible so we can ascertain whether there is true interest on any possible bearing of --

Q Would it change your answer if during the discussion on May 14, 1973, between Mr. Flamia and OSG in the OSG office in Illinois, if Mr. Flamia at that time indicated that he would be willing to put up $100,000 to purchase stock of Sossner from OSG if OSG should acquire the corporation?

MR. LEDWITH: Objection, your Honor.

THE COURT: Yes. Not quite the way plaintiff's theory went. As I understand it, the plaintiff's theory, he was asked if he would be willing. This is the plaintiff's theory. He was asked if he would be willing to participate with OSG in the acquisition of this company and purchase was 5 or 10 percent.

MR. LEDWITH: Fine.

THE COURT: 5 percent interest of the $2-million. Either put up a hundred thousand dollars of his own and participate, according to the plaintiff, in a joint venture with the OSG. If you assume that as part of the hypothetical, would it change your opinion as to the value of services and interest?

THE WITNESS: Well, I would just wonder if he was performing a role as a finder or performing a role as an investor. If he was investing, that's an entirely separate subject.

If his intent was to invest, I don't see how he could be both.

THE COURT: His theory, I'm not trying to paraphrase. You'll get this on cross-examination. His theory as I understand it, it was a combination. He was in essence a joint venturer, who was prepared to put up this money and was going to be given the

chief executive officer's position. And he in exchange for this, he was going to give the information he had with respect to Sossner to OSG and they were going to acquire it together.

MR. LAMBERTON: With all due deference, your Honor, I think you're asking about damages on a joint venture, a breach of a joint --

THE COURT: This is the basis for his objection to your hypothetical, the way it was put. You can ask it the way you want. But this is the basis of his objection, is that right?

MR. LEDWITH: That is correct, your Honor.

THE COURT: If you've got an opinion, if you put that into your equation, do you have an opinion as to what the value of his services and interest are?

THE WITNESS: I don't think that would be in effect value, whether he was going to invest it or not going to invest in it.

THE COURT: Okay.

Q At my request, Mr. Sternlieb, did you read the article, "How to make the impossible merger," by John Shad, which was included in the book, Acquisition, Merger, Negotiating Strategy, edited by Mark Strage?

A Yes, I read that article.

MR. LAMBERTON: I call your Honor's attention to the fact it was the book relied upon by Dean Warner were described as authoritative by Dean Warner in his testimony. Dean Warner read and excerpt from that book. I propose to read a slightly larger excerpt of that same passage and receive the opinion of Mr. Sternlieb.

MR. LEDWITH: I'll object to that. That is not proper use of an expert text. It could be cross-examination.

MR. LAMBERTON: It may be direct examination, Rule 803-16.

THE COURT: Under the rules, he may be right.

MR. LAMBERTON: I think it's 803. 17, I believe, that would be one of the exceptions, your Honor. 803-18, your Honor.

THE COURT: Just one minute.

MR. LAMBERTON: This was relied upon by Dean Warner on direct examination and called his attention to on cross-examination and identified it as a text upon which he relied.

THE COURT: You can read it, but you can use it with this witness, that is another --

MR. LEDWITH: Dean Warner didn't refer to that

book on direct examination. He was referred to it on cross-examination when he was asked where did he get --

THE COURT: To that extent, calling of an expert upon cross-examination or relying upon him in direct examination, statements contained in a published treatise and so forth establishes a reliable authority by the administration of witness or by other expert testimony or by judicial notice may be read into evidence. He can read it into evidence. He can ask him whether he agrees with it. He can read it into evidence.

MR. LEDWITH: All right.

MR. LAMBERTON: At this time, I believe the commentaries, it's well to have an expert on the stand to explain any of the matters.

THE COURT: He can explain what this other author had in mind when he made the statement. He can read it to all of us.

MR. LAMBERTON: I would like to read it to all of us with respect to Mr. Dean's previous testimony when a worthwhile prospect is, this is from Page 223 of that particular book.

When a worthwhile prospect has been uncovered, an early determination should be made as to where effective control resides and whether the holders thereof will be receptive to an offer. From this point of view, the ideal acquisition prospect is a closely held company in which the controlling stockholder has reached retirement age and does not have younger members of his family coming along in the business.

It is exceedingly difficult to acquire widely held companies in which the managements hold only a modest equity interest. Professional executives typically want greater autonomy and less accountability. The prospect of stockholders receiving a high price for their stock is no great inducement to a management that holds a nominal interest ir the company. However, it is among such companies that bargains are often found -- i.e., companies whose securities are selling at low prices relative to their earnings, cash flows, and/or underlying assets.

If effective control resides with the investing public-at-large, one should appraise at the outset the probability, time, and cost of acquiring the company (a) through a merger with management's cooperation, or (b) through open market accumulation, the purchase of large blocks from institutional investors and/or a public tender or exchange offer to the company's shareholders. This requires an analysis of:

- The holdings of the officers, directors, and over-10% stockholders listed in the company's proxy statements.

- The published holdings of institutional investors.

- The volume of trading in the stock.

- The terms and condition of all the outstanding classes of securities (particularly the voting stock and issues convertible into it, and warrants and options to purchase it).

- The voting rights -- whether cumulative or non-cumulative.

- The method of electing the directors -- whether annually or on a staggered basis for a term of years.

The average premium over market price typically paid by buyers, in mergers approved by both companies' managements, is approximately 20%. An additional 3% to 4% should be added to cover brokerage commissions, legal, accounting, printing, advertising, and other costs. This does not take into account the significant diversion of management's time from its normal operating responsibilities.

In the case of tender and exchange offers opposed by management, it is typically necessary to offer at least a 25% premium and to set aside an additional 5% to 10% for expenses. If litigation results, as it often does, it escalates the cost and protracts the time.

Q Did you include a premium in your estimate of the value of Mr. Flamia's services?

A I'm not sure I understand what you meant by a premium in the estimate of his services?

Q There's an indication in the text which just has been read into evidence that in certain circumstances, either a 20 or 25 percent premium is added to the purchase price. Did you add a premium, did you include a premium in your estimate of value of Mr. Flamia's services?

A Well, this was a -- this was not a public company, as I believe the text was read, which was read, refers to, and there is no premium involved, that I could think of and I would not include any premium.

There was no premium in the conversation, premium over what?

Q What is the premium that Mr. Shad is referring to, if you know?

A It sounds to me as if he's talking about a premium over in excess of the market price of the securities in question.

Q Did you include an estimate of the value of a specific amount for a potential time and expenses of the executives of OSG acquiring the company?

A I considered the services rendered and I considered the amount of effort and time that might have been expected to answer that question.

Q Did you add a special sum for that amount?

A It was included in my estimate of from 20 to 25-thousand.

Q Did you include your estimate of value, a separate amount based upon the information that Mr. Flamia provided to OSG and the operation and finances of Sossner?

A The reason that I came to the high end of the range, where I talked about it, 5, 20 to 25 percent, because of what Mr. Flamia gave and the services he rendered and it was all included in one sum.

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Q I take it that is twenty or twenty-five per cent of a $90,000 fee?

A That's correct.

Q Is it customary in negotiating acquisitions or for a sale to fix a purchase price for his business, then to add to it an amount equal to the fee of his investment banker or finder?

A No. In my opinion it is not customary.

MR. LAMBERTON: I have no further questions.

CROSS-EXAMINATION

BY MR. LEDWITH:

Q Hello, Mr. Sternlieb. I think when Mr. Lamberton was asking you a question about your evaluation of Mr. Flammia's services, he changed around the hypothetical and maybe the judge did, and said to you, "Please assume that Mr. Flammia was requested by OSG to invest $100,000 in the ultimate purchase price towards a direct acquisition of Sossner."

All right, so that he would be asking not only as a finder, but as an investor, or a joint venturer. Do you recall being asked that?

A No, I do not recall that he was asked by OSG. I thought he volunteered to invest the money. It is a little different.

Q Certainly.

THE COURT: I think I put it the other way. I relied -- I don't recollect precisely that conversation but my recollection, my best recollection is that OSG asked him whether he would be willing to put up money of five per cent. But assume it to be that or assume it to be either way?

THE WITNESS: Fine.

THE COURT: Go ahead with the question.

Q Do you recall that conversation in any way: I think your response to that was, "Well, if he was an investor there would be a whole different game." Is that what you said?

A I said I would think if he was being, if he was going to buy a piece of a company he would be investing in the company.

Q And he wouldn't be a finder?

A I would find it difficult for him to be a finder, investor at the same time, although there had beensituations where that has happened.

Q I'll tell you what. Just for the sake of answering these few questions, assume that on May 14th, all right, when Mr. Flammia talked to the folks at OSG, that he first started talking about his own purchase of simply finished tools from OSG and a discussion then evolved and it became clear to Mr. Flammia perhaps OSG Company would like to purchase

a company like Sossner.

Assume now that Mr. Flammia had been with Sossner for some twenty-five or so years and almost personally built that company up to the stature that it received, it had when he had left in 1973 or so:

Assume that Mr. Flammia had a great affection for the company, Sossner. But that he was almost compelled to leave because the parent company was not interested in providing enough capital investment for getting the machinery upgraded so that Sossner could compete with the general competitors and the market: Assume further that Mr. Flammia foresaw a good wide open market, some five years down the road. That he tried to persuade Mite that in order to get Sossner to become a lucrative company this initial investment would have to be made and that Mite in essence refused to do that.

Assume Mr. Flammia foresaw without this capital his own future as president of the corporation would not be good because the corporation would fail and accordingly he would go out. Assuming that is why he left the company. But still he always wanted to get that company joined with someone else who could make the proper capital investment to get that company on a fine fiscal future.

MR. LAMBERTON: I object to it. It is all irrelevant. It assumes the values the services

performed by Mr. Flammia --

THE COURT: I will take it.

Q Assume even after having left Sossner and Mite, that Flammia still wanted to acquire Sossner. Even after having made this offer of 1.6 million, which ultimately did not work out, assume that he went to several companies to try and work this deal to buy Sossner and to have the folks to whom he spoke had no interest and the third party did have an interest.

Assume that when he spoke to the people at OSG, his primary consideration was not simply to bring the two together, but his primary consideration was to get back with Sossner himself, to be President of Sossner as under such condition he knew, as I explained to you, would get Sossner on the road to a fiscal and healthy fiscal future.

Assume that was his prime motivation and assume further he was more than willing to assume a $100,000 of his own money in the acquisition. If you assume those facts, I'll tell you what. Let's go a little further.

Assume this, also: When he spoke to the people at OSG, there were several agreements made. One was that since OSG had no one who could run Sossner, should it be acquired, that they asked him if he would be willing to run it as executive officer and he agreed.

Assume they asked him would he invest $100,000 in the acquisition to show his good faith.

Assume that all this interest was stirred up at the beginning, plus Flammia presented his forecast to the OSG people. This being now Mr. Zoppelt and Mr. Osawa and this forecast was a very comprehensive indication, not only on the strong points but also on the weak points and also it included what was needed to get the company started.

Assume that there was, it was agreed, should the company be acquired and should Mr. Flammia act as the executive officer, that he would receive an income which would be calculated as follows: There would be a basic salary of $30,000 with various techniques which would under proper circumstances get his income up to possibly $100,000 a year as an executive officer.

Assume also that the folks at OSG assured Mr. Flammia that they had more money than was required to make the acquisition of Sossner and that they were earnest in -- about their interest.

Assume also that OSG told Flammia that they had first of all interest in the acquisition, second of all they had more than anybody else had in the United States, facilities to properly capitalize Sossner to get the proper machinery

into Sossner and that they had the interest in making Sossner one of the more meaningful or largest tap producing companies in the United States, which of course complied exactly with what Mr. Flammia wanted.

Assuming all these things were discussed on May 14th and were agreed to and that Mr. Flammia and OSG then went on from there with the idea they had been working in joint venture.

Now, with these facts in your mind, would you have an opinion as to the value of what Mr. Flammia had to contribute to the joint venture?

MR. LAMBERTON: Objection, your Honor.

First of all, in all of those assumptions we have a number of things which there is no testimony with respect to, the May 14th meeting, which includes any of the particular factors, a great many of factors that Mr. Ledwith has adverted to. What he has done has taken a memorandum, EX20, which at the best was left with OSG on May 14th in order to be read over the night, over the next day, according to his own testimony, which was denied by us. None of those things were available to the executives at OSG, even under Mr. Flammia's theory that during that conference of May 14th. Mr. Ledwith has packed the assumptions absolutely contrary to fact. I say the question is improper

on those grounds.

THE COURT: No, I will take it. But I'm a little confused about the question at the end. The way you put it. Could you isolate the question, part of that hypothetical, just the last line, the way he phrased it, the word "had" is what bothers me. The word "had" is what bothers me.

MR. LEDWITH: Who had?

THE COURT: Read back the question.

(Whereupon, the Court Reporter read back the last question.)

THE COURT: What is confusing to me, perhaps what he had to contribute.

MR. LEDWITH: I will rephrase.

THE COURT: $100,000 in cash for one thing, or you're asking for something, part of the hundred --

MR. LEDWITH: I will withdraw that part of the question. I will rephrase it.

THE COURT: Yes.

Q Mr. Sternlieb, with those facts in mind, do you have an opinion as to the value of the contributions, other than the cash contributions, that Mr. Flammia gave to the joint venture at that point?

A Well, I don't know that there's the joint

venture because --

THE COURT: Assume there was, that is what he is saying.

A There would be some type of agreement, if there were a joint venture.

THE COURT: I understand. This is a question of law. You have to leave that one up to me. Assume.

A If there was a joint venture, the value of services would have been those that had been discussed between the people. But there would be none -- there would not have been any judgment at that point. A fee payable to him as a finder.

Q So your answer would be that with just those facts and nothing more, you don't have an opinion as to the value of what his services were as a joint venturer and participating joint venturer?

A His value is whatever was negotiated between the parties as to his compensation.

THE COURT: But let's assume there is no negotiation.

A There was some stated as to the fact he would be paid thirty or thirty-five thousand dollars. An opportunity of earning up to a hundred thousand. These were things that were individual, I was asked the value, what is, whatever the

future can tell, whatever he can earn. Whatever, under whatever information is, that is the only assumption that the transaction has been consummated on.

BY MR. LEDWITH:

Q Mr. Sternlieb, you did give an opinion to Mr. Lamberton as to what Mr. Flammia's services were worth, did you not?

A Services, yes.

Q Of course, there was no agreement as to what compensation was under the facts that you had, was there?

A In terms of the salary, you mean?

Q In any terms at all. You gave an opinion based on the facts which you had, which facts did not include any agreement between anyone.

A That's correct.

Q The question, what is the reasonable value?

THE COURT: He is asking what the reasonable value is on a different basis. That's all he's doing, Mr. Lamberton. Whether there's a basis for it or not I don't know.

Q The fact is, and you could assume this fact: There was no specific agreement as to what his services were worth through the joint venture. I am asking you are you able to give an opinion as to what his services were worth

to his joint venture based on the facts that I gave you?

A In bringing about a joint venture which never materialized?

THE COURT: Assume for the purposes of the question, frustrated by OSG, that's the Plaintiff's version.

A If you are trying to assign a value to his worth as managing the business, that is one value. If you are trying to assign the value for his calling this opportunity to the attention and providing the information he did, to OSG, that I believe the answer I gave before, gave before would still stand, with a ballpark figure of twenty to twenty-five thousand. I relate, if he would, were to get the maximum for all the types of services we provide.

Q Please don't go into your answer.

My question is you don't have an opinion as to the value in the joint venture agreement, joint venture?

A Yes.

Q And your opinion is your earlier statement, it would not change?

A Twenty to twenty-five thousand dollars.

Q Thank you.

Now you testified that when Lehman Bros. goes about acting on behalf of a seller that you go through various

things. Firstly, you insist on an exclusive agreement with the seller?

A Yes, sir.

Q And the reason for that is because you are going to invest a good deal of time and talent and work to properly evaluate that company for eventual sale?

A Because we're going to invest a lot of time and talent, correct.

Q This time and talent and work of course would be the fee you might earn, should there be a sale?

A There is a lot more to it, sir. We also would find and because of our unique knowledge with many companies, which may be in Japan or they may be in Europe or somewhere in the United States, we may find companies that have a unique reason to pay a top dollar and still have a fair transaction for both of them and the seller. We have this unique knowledge of contacts with many contacts so that we obtain a fee for more than just a little bit, you're talking about.

Q So then we are talking about four things. Time, talent, effort, and unique knowledge.

A Yes, sir.

Q These four things in general?

A And negotiating.

Q And negotiating, five?

A Yes.

Q These five things would form the foundation for your earning whatever fee it is that you would earn?

A Sir, I don't think -- I'm sorry, I didn't get your name?

Q Ledwith.

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A (Continuing.) It is pretty difficult to show you every service we provide because many of them are in the nature of hand-holding. Many many of them are in the form of understanding people. Many of them are in the form of having the confidence of the parties involved and having the recognition that you were dealing fairly and honestly and that when you come and talk, that you hopefully bring two individuals to an agreement on a fair and reasonable basis.

Q I'm glad you brought that up too. We're talking about six things, time, talent, effort, unique knowledge and --

A I'd say there are many things that can't be enumerated.

Q Let's take it step by step, okay?

A Okay.

Q And also your position in a trustworthy situation, where both parties would rely on you?

A I don't know that I said --

Q I'm trying to summarize. So we don't, would that be a fair summarization?

A Reasonably fair. I wouldn't call it a hundred percent.

Q Now after you went through the process, assuming

you did go through the process trying to get a deal together and you asserted your time, your effort, your talent, your unique knowledge, your negotiation skills, and your position of trustworthiness and the deal fell through, right? All of that time, first of all would you get a fee?

A We recently have entertained new types of fee arrangements.

Q Let's use the old ones?

A The old. No, we would not get a fee.

Q But what you would do is reserve all of this talent, you have for possibly a few fires just in a few transactions?

A Well, the objective is when we sign the exclusive understanding, we signed it for a period of time and if we don't succeed in consummating a transaction with the first potential buyer, we would then move on to the second and so on, yes.

Q Your answer is yes, all right.

With the second buyer, you wouldn't have to again invest as much time, effort, talent, trustworthiness, or whatever? The only thing you would have to do, the only thing left is negotiations, is that correct?

A No, sir. That is not correct.

Q Well, is there any unique knowledge?

A No, sir. We have to do more than that. Because we have to try and ascertain the company, you're using the word unique knowledge, and find out why we think they may have an interest and we have to protect the acquirer and explain there is a unique opportunity here and the reasons for this unique opportunity and try to understand if it makes sense for them and if it makes sense to proceed. If that is the course. That is in getting them to investigate the situation further. To go with us. Use what materials we can furnish. If they find their further interest, then we get into negotiations.

Q Your answer is yes, you've already expended your time and you're back to negotiation?

A I'm sorry?

Q Let me pose a question and perhaps you can explain it.

We may be where -- I may be in error. You already invested your time and effort and what have you. Deal One falls through. You have to look for a second deal. Once again you resort to your unique knowledge of the possible buyers. You look at their interest and then you must also once again invest your negotiation talent. Which includes making the contract and starting the ball rolling all over again, would that be a fair statement?

A In time, which can be considerable.

THE COURT: What he's saying is, and as I understand it, see if you can follow. You don't have to go and re-examine the seller and spend all the time and develop a history and finances?

THE WITNESS: Yes. If he asked the question that way, but he's limiting the fact we have to go and spend a considerable amount of time.

THE COURT: With the buyer?

THE WITNESS: With potential buyers, it's a matter of education.

THE COURT: I follow you.

THE WITNESS: But I couldn't answer the question because he was leaving it out.

THE COURT: Quite right.

Q Mr. Sternlieb, in a nutshell, what you told us is the work that you performed for which you earned your fee?

A Correct.

Q Now let's just try and make a comparison between what Lehman Brothers, as the professional business broker did and what Mr. Flamia did in this case. Okay, first of all, Lehman Brothers once they get a seller or a company to be sold, first they do investigation in the company, about the company?

A I'd like to interrupt, if I may, sir.

I will say the first point you made when you give the seller a hand, let me assure you that you are not exclusively authorized to represent a seller and spend a considerable amount of time and work. It involves details, confidence and an explanation to him how you go about your work and having him assured you're going to have his best interest in mind and that you are a professional and confident in getting the job done.

Q Thank you. Just try and follow my question.

One of the things you do when you first get ahold of a company for sale is to make a thorough investigation into the company so that you and the seller know what the company is all about. Is that a fair statement?

A Yes.

Q Would you agree with me that Mr. Flamia was the president of Sossner Corporation, which is the company we're talking about here for sale, these twenty-five years, it gave him a very good intimate knowledge into what Sossner Corporation was all about?

MR. LAMBERTON: I object, your Honor. He is asking for an agreement of a witness' testimony he has never heard or read. If he wants to make an assumption that the witness --

THE COURT: That's a little hard for him to know. I think you can argue that to the Court. I don't think this witness knows what Mr. Flamia did. I think I'll have to sustain it on that ground.

MR. LEDWITH: I'll rephrase it.

Q When you make your investigation into the company that is to be sold, do you normally or would you like to contact the president of that company to find out what he has to say about it?

A We normally speak to management and understand management and meet with the owners and have the various key officers of the business.

Q Would you like to speak to the president too?

A The president of the company, yes.

Q And would it be correct to say the reason why you would like to speak to the president is probably because he has more knowledge -- I'm sorry, probably more knowledge than anyone else about the overall picture of the day to day runnings of the business?

A I would not make that assumption.

Q I assumed you wouldn't, but anyway, would you assume for the purposes of this question that Mr. Flamia did in fact have a very detailed knowledge of the inner workings of the production picture of Sossner Corporation: Now would

you assume that Mr. Flamia did engage in negotiations with Mite for the purchase of Sossner Corporation. All right, now assume also that these negotiations failed. Will you do that?

A Yes.

Q Would that be comparable to perhaps the things we discussed earlier where Lehman Brothers would prepare all the necessary information, make all the necessary work in order to enter into negotiation for the sale of the business?

A I don't think so, at all, sir.

Q If actual negotiations between Mr. Flamia and Mite Corporation went on and failed because of a purchase price difference of $400,000, general other things, would you agree, would you consider it as comparable --

MR. LAMBERTON: I object. He's asking, he's offering a theoretical --

THE COURT: A hypothetical, as far as this witness is concerned, and I'll take it as such. I realize he doesn't have any knowledge what the negotiations consisted of. I will take it for what it is worth.

MR. LAMBERTON: If we understand, if he understood it as a hypothetical?

THE COURT: It is a hypothetical.

THE WITNESS: Your Honor, I'm getting so many hypotheticals, can I get a piece of paper so I can just mark down some of these hypothetical things?

Was your question, sir, that would I assume that the events that transpired when Mr. Flamia was negotiating to buy the business himself, were exactly the same as performed by Lehman?

Q No, comparable?

A Comparable, that it was comparable?

MR. LEDWITH: I will withdraw the question.

Q Assume first of all that Mr. Flamia did have an intimate knowledge of Sossner. Probably even better than Lehman could develop through his investigations. All right?

A Yes.

Q Assume that: Assume that Mr. Flamia consulted with his accountants and his attorneys in order to evaluate the market value of Sossner. Okay.

Assume that Mr. Flamia was on good terms with the management of Mite Corporation and that he was regarded as an honorable individual. Assume that he spent the time necessary to develop a reasonable package offer to Mite. Assume that thereafter the negotiations went underway. Assume that Mr. Flamia offered $1.6-million for Sossner. Assume that Mite Corporation wanted $2-million. The

negotiations ceased and any possible deal was gone.

Now, with these factors involved, would you consider this a comparable activity on the part of Mr. Flamia as Lehman Brothers might perform for the parties involved in a possible acquisition?

A Who was he performing the service for?

Q He's acting on behalf of himself.

A No, I would not consider this at all comparable.

Q Where would you draw the distinction in judgment. You have one potential buyer, you're talking about one person, the first thing that Lehman Brothers would do is to look at who might be able to pay the most. Who might be the best people we might get along with. Who might result in having the ability, as you earlier stated, to put in additional money in a successful venture that he would like to look at?

A We would not go to one buyer. We would assess a whole -- a great deal of potential acquirers. We would go to ones most fitted or proper.

Q And the reason why you would do this is to go back to the principal, here is the list of most possible purchasers, who should we talk to first?

A We recommend and who we think and we discuss

it. Interestingly enough, many things that come in besides dollars and cents is --

Q Your answer is the reason why you compile this is to find out who you want to talk to first, is that right?

A We just don't ask the seller which one.

Q I understand that. That is a lot of talk.

A We make recommendations.

(Continued next page.)

jk
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BY MR. LEDWITH:

Q But the two of you do determine who you want to talk to first, correct?

A Correct.

Q Assume in this case Mite selected Mr. Flammia. They wanted to talk to him. Would you consider the calculations as what Lehman would put together?

A I have not seen it, whether he prepared a document that would be comparable to Lehman Bros.' documents, in terms of providing the information and I think I made enough of a statement earlier, what we would include in it. I have had the opportunity to see briefly the document that was in question. It was given to me by Mr. Lamberton. We would furnish much more complete information of that particular company.

Q Other than whatever you just said, would it be a comparable type of preparation for an acquisition?

A Well, like in all other things I think if someone needed a good lawyer, they would go to a lawyer, experienced in the field that is in question.

THE COURT: We assume that.

A And I have to assume from the point that you have just made that Mr. Flammia is an expert in negotiations and transactions. If he wants he would have probably obtained

an expert.

Q I ask you to assume.

A I am.

Q He consulted an attorney and he consulted an accountant?

A You did not say anything before about experience in negotiation and values. He obtained a value from an accountant and attorneys that might, their values might be completely irrelevant and may not be accurate.

Q Let's assume the attorney was a good attorney and the accountant was a good accountant.

A Fine. That doesn't make this investment banker give them a particular ability to place a value on the business. That is a personal judgment.

Q Assume they have the ability. Would you now consider it a comparable computation as Lehman Bros. --

MR. LAMBERTON: Asked and answered. He has indicated the financial statements are vastly different.

THE COURT: I understand. He put it all down. I don't know whether he's putting it down in writing necessarily, whether it's material to this question. It may be material as far as their clients are concerned, but it may not be material to Mite or both who look at the facts. Putting aside what you

summarized in writing and give to the client, is the groundwork essentially the same in the two transactions?

THE WITNESS: I think the real question at the beginning of it, which explained is that you have to in the way we handle these transactions is to first gain the confidence of the seller and be able to represent them.

THE COURT: He asked you to assume that.

THE WITNESS: You are assuming he does everything that Lehman Bros. does, is that the question?

THE COURT: No, it's not. Assume that Mr. Flammia by virtue of his being a prior president has the confidence of the management. They have chosen him to deal with him. He has gotten an accounting firm, a lawyer firm to make the appropriate analyses and they have done the negotiations. From the facts he writes up a report, a full description, I think you characterized. How is it different from what you did?

THE WITNESS: It differs in the sense that once we have had a lot of experience in negotiations and consummating transactions --

THE COURT: I will grant you that.

THE WITNESS: I think it is an important

question because I would hate to be the first guy operated on by a brand new surgeon if it's brain surgery.

THE COURT: What if it happened? Would you charge five per cent of the first million?

THE WITNESS: Right. But there's one thing I may say gratuitously. That is, Lehman Bros. never tries to force a transaction. If it's not acceptable it doesn't go.

THE COURT: He's asking you. He's saying and what he is saying to you is Mr. Flammia started with the knowledge that your associate and other people who you sent out making the investigation and examination have, with the confidence of the management. He didn't start with all the factors under his belt. He assumed he went through the negotiations. He knew what the general negotiating peak was and there was a failure on that negotiation. Is he not a part from your expertise at Lehman Bros. putting in a sizable investment, isn't he roughly in the same position that you are in with respect to Sossner?

THE WITNESS: In terms of information?

THE COURT: Yes.

THE WITNESS: You are just asking the assumption

he has the same information, if that is the assumption?

THE COURT: He doesn't have the expertise. Would you say in negotiation?

THE WITNESS: Nor did he have the authorization, nor did he have a signed letter of agreement before he started to undertake this transaction. There are quite a number of instances currently taking place --

THE COURT: That signed authorization is for your protection primarily since nobody else can come in and take over your exclusive territory.

THE WITNESS: It's not only for your protection, it's for the client's protection. We found many people, when they hear a company is available, go around shopping that company. We have found that you have "finders" coming out of the woodwork.

THE COURT: Because the word is out?

THE WITNESS: As soon as the word is out and they say we know this is available. Would you be interested, and they say, "Sure, we're interested," and they go to the other side. Mr. X is interested in you and will be glad to meet you. They have no authority in the matter and we don't operate that way.

THE COURT: Go ahead, Mr. Ledwith.

Q Sir, you were asked to assume certain things

that Mr. Flammia had done and had prepared for and had with him when he first entered into the negotiations with Mite Corporation. Are these things not the same things that Lehman Bros. would like to have under its belt when it makes the initial contact with the possible buyer?

A Certain things, I have the exclusive authorization. He doesn't have the experience of having the expertise in negotiating. Closing the deals. I will accept your assumptions and other things that you have mentioned. You have recited them as an assumption.

Q Let's talk about the things that you've left out. A signed agreement would be between whom?

A Between a potential seller and the person representing the seller.

Q But of course that wouldn't exist in a case like this, would it? You just wouldn't have that kind of thing in this situation that you are faced with now?

A There are many situations taking place today where companies are divesting, dividing, and they are selling them to the management. With all of the assumptions that you have made I can tell you that there are many cases where the management gets preference in making an acquisition and gets terms whereby they can be made perhaps more favorably because of the unique relationships.

Q Now we've gone to the point, we've assumed that Mr. Flammia had this certain compilation of facts and materials when he discussed it with Mite for a possible acquisition and that deal fell through, right. Now, assume further that although he was unable to negotiate a deal on behalf of himself, Mr. Flammia then went out and sought to meet with a partner who would have the requisite amount of capital to 1) be able to purchase the company from Mite; and 2) to properly be able to supply the capital to Sossner, should it be acquired, to make it a successful company.

Will you assume that?

A Yes, sir.

Q And would you assume now that Mr. Flammia met with the people of OSG and that he discovered that OSG, 1) did have the money to buy Sossner on the terms which Mite would like and that he also discovered OSG had the interest in capitalizing Sossner to make it a major production facility in the tap industry: that he then began -- I'm sorry, withdrawn.

Assume further he discussed these matters with OSG and asked whether or not they would be interested in looking into the acquisition of Sossner with the Mite Corporation. Will you assume that?

A Yes, I will.

Q Will you assume that he was given the okay to get the ball rolling and that he then brought the parties together?

A Who?

Q Brought OSG, he brought the parties together and within a month or so later a letter of intent was signed. Now did Mr. Flammia or did he not in your opinion perform basically the same functions that Lehman Bros. would perform?

A No, sir.

Q Where do we distinguish Lehman Bros. did?

A I think you have gone over that before, to start with.

Q Let me ask you the question, then:

MR. LAMBERTON: May be he permitted to finish his answer?

THE COURT: Let him take it step by step. It may be clearer.

Q You said that Lehman Bros. would investigate the company so they know what they are selling. Would you agree that Mr. Flammia, based on the assumptions you have, he knew enough about the company to be sold, to discuss it reasonably and intelligently?

A You made that assumption, I have no knowledge.

Q I asked you to accept it.

A I am assuming the first step is the authorization.

Q Let's skip that for now. Will you agree that he had that under his belt?

A You have to assume it, so it is so.

Q Will you assume further, that Mr. Flammia invested the time to go and look for a possible buyer?

A Yes.

Q I ask you to assume that.

A Yes.

Q That is something Lehman Bros. would do; is that right?

A Yes.

Q Did Mr. Flammia not have behind him the advice of talented expertise, such as attorneys and accountants just as Lehman Bros. would have done, as we assume?

A You are assuming.

Q We assume.

A If you're assuming, then I'll have to assume it.

Q Was not, I'll ask you to assume one more thing. That Mr. Flammia was requested by OSG to invest $100,000 in the acquisition of Sossner in order to show his good faith. Now, I will ask you was not Mr. Flammia at that time most assuredly in a position of trustworthiness and just as Lehman

Bros. would have been?

A There is a couple of things that raise questions in my mind.

MR. LAMBERTON: Your Honor, I don't see how the question could possibly be relevant with the assumptions unless we add a further assumption, he mentioned the price to OSG and the 25 per cent and with all his attorneys and accountants and experience decided what the appropriate price and fair price --

THE COURT: I think you brought that out yourself Nothing was discussed between the parties.

MR. LAMBERTON: That seems an essential part of this assumption if you are going to cover the same thing.

THE COURT: As I understand, I think I can shortcut what you say. Your two basic differences, one, exclusive authorization from the seller, then the other written summary to be prepared and three, your negotiation expertise?

THE WITNESS: Also, I would like to mention, your Honor, one other thing. We have, could have covered a wide range of buyers and other subjects which appear to be part of this. It appears Mr. Flammia was seeking to regain the position as President of this

company and run the business. That may perhaps lead one to a certain type of acquirer as to another type of acquirer. I think the assumption was made by counsel that he wanted to get back in and run this business.

Therefore if he wanted to get back he may approach a certain type of acquirer and not other types of acquirers which may limit the field to a very narrow group of companies.

THE COURT: I see what you are saying. Those are roughly four areas that would be distinguishable from him, given all the assumptions he has made.

THE WITNESS: On a floating position, conflicting position, he's desiring to be President and consummate a good deal for him --

THE COURT: He has a slight conflict of interest?

THE WITNESS: Absolutely. I think this point was brought out by Mr. Lamberton. It was worth 1.6 million dollars under certain conditions and it was worth two million dollars. You invest on one basis to some extent but not on another. But to accomplish one end, that is to accomplish becoming President.

Q Now did you, sir, ever sell a tap and die company?

A No, I did not.

Q You never made an investigation into a tap and tool company, so you can't speak from the point of acquiring and selling tap and tool companies?

A That's correct.

Q If Mr. Plammia did in fact or did in fact have a great deal of expertise about the tap and tool industry, he would be more qualified at this point to discuss the negotiations about a tap and tool company; would you agree with that?

A No, sir.

Q Did you hear Mr. Lamberton's statement that the tap and tool industry in the United States is not a very large industry?

A Yes, sir.

(continued next page)

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BY MR. LEDWITH:

Q The entire industry has gross sales of approximately a hundred million dollars. Did you hear that?

A Yes.

Q Now will you assume further that Mr. Flamia didn't only know intimately the Sossner Tap & Tool Company but Mr. Flamia also intimately knew the entire Tap & Tool industry in the United States: Will you accept that?

A Yes.

Q Will you assume that he knew all the companies that did business in the United States and that he knew many of the executives who operated those business.

MR. LAMBERTON: Objection. These are assumptions that are contrary to fact. He's testified the evidence to having some knowledge of the companies in the area --

THE COURT: I think that is a little bit broad, that last assumption is a little broad.

MR. LEDWITH: I'm sorry. I will rephrase it.

Q Assume that he knew all of the tap companies in the country and that he knew many of the executives that ran some of these companies?

A Yes, sir.

Q Now assuming with those facts, would you consider him knowledgeable or as knowledgeable as Lehman Brothers could ever hope to get to be about knowing what potential buyers there are for Sossner?

THE COURT: Whatever hope to get to be, it all depends.

THE WITNESS: We spent years and for example may I ask you this question, did --

Q If you can answer --

MR. LAMBERTON: Just wait, just a second.

THE COURT: I will sustain the objection to the question in that form.

MR. LEDWITH: I will rephrase the question.

Q Assuming the knowledge that Mr. Flamia had, I just described to you, will you agree that it was a broad knowledge of the industry generally?

A The broad knowledge of the industry in the United States --

MR. LAMBERTON: The witness is to make an assumption but he cannot testify as to his own knowledge or agree with Mr. Ledwith as to what's been testifie to before.

THE COURT: I think you ought not to put it in terms of evidence. If you want him to take what you

assume, but don't ask would Lehman Brothers possibly ever achieve that level of knowledge. Of course they couldn't.

MR. LEDWITH: Fine.

Q Would you agree that with the facts that I just gave you to assume about Mr. Flamia's knowledge of the tap industry in the United States, that he had a very broad knowledge of the possible buyers for Sossner?

A I can't assume that.

Q I'm not asking you to. All I'm asking you is to give me an opinion?

A Well, my answer would be no.

Q Your opinion is that he did not have a wide grasp of the possible buyers for Sossner?

A May I give you an example.

Q Is that your opinion?

A That is my opinion.

Q That he did not have knowledge of a wide --

A He had some knowledge. But I would like to give you an example, if the Court would permit. I can give you an example where I've had partners on the board of companies, and I'll give you a specific example. There were a chain of shce stores --

MR. LAMBERTON: I'll object as not being a

responsive answer.

THE COURT: He can give an example.

A Edison is a well-known chain of shoe stores. First, I had a partner who was on the board of Edison Brothers. I also was retained to represent a small chain of three stores that were in the do-it-yourself hardware business. I looked at the needs of that company and found the company needed a loan to grow. This is ten years ago. This management needed the money to open new stores and they had real estate expertise. I knew Edison and I knew they had expertise and cash. I knew they had a great deal of real estate expertise and I also knew that management training program second to none. They have a load of experienced managers. I went to Mr. Nadelson. I said "Morris, I would like to show you this chain of stores, of hardware stores, I would like to sell it to Edison." He said, "What are they?" I said, "Hardware." He said, "What does hardware have to do with us?"

I said, "That's irrelevant," and I explained the needs and three things. He said, "You're out of your mind, forget it."

I finally got him to meet the president of Edison, and I asked him for a favor and for his permission as director to speak to the president of Edison. They had never

had an acquisition and he said later after they acquired the company, it turned out to be the greatest investment acquisition.

My point in answering the question, no, is that you have limited the scope of potential acquirors by your assumption, Mr. Ledwith, limiting it to tap industry and you have not focused on any people who might have other expertise, perhaps in building machinery, perhaps over in Germany and that might be interested and I am not sure, sir, the market was --

Q Is this your opinion?

A This has to be, I know.

Q The opinion --

THE COURT: I have the opinion. What he has illustrated here, there may be a border acquisition for Sossner than other tap and tool companies.

MR. LEDWITH: What was meant --

MR. LAMBERTON: I take it that last question was withdrawn?

MR. LEDWITH: Yes.

Q The example you gave was a good one. You indicated you had a company that you saw required certain treatment in order to prosper. That being money, plus some expert guidance, is that right?

A It needed three ingredients.

Q Surely every case differs, we'll agree to that?

A Right.

Q What Mr. Flamia did do in this case I think you can, based on the facts that I have asked you to assume, if you assume Sossner was the company to be purchased, he went and found the company that could first of all pay for it, second of all give it the money and tools that it needed to get into the industry and to compete vigorously.

Also he gave it the guidance for the expert who had given the guidance, namely if the deal should fall through, do you think it was a good job of putting a deal together, yes or no, if you can?

MR. LAMBERTON: I object.

THE WITNESS: I can't answer.

MR. LAMBERTON: I object on the grounds we're again making -- we have here not assumptions of fact and not assumptions, but testimony. I don't agree he gave them this. These things we disagree with them on the record and we have no objection as to assumptions on hypotheticals, but these things given to Mr. Sternlieb, factual statements, it seems to me beyond --

THE COURT: I'll have to make the finding of

fact. I'll let him ask it on the basis of a hypothetical.

MR. LAMBERTON: If we understand Mr. Sternlieb assumes that is a hypothetical before he starts.

THE COURT: I'm assuming. I understand these things, even when you went through your hypothetical. I had roughly the same three differences in your opinion, believe it or not, when you came out. I understand what he's doing and you understand what you're doing. At least I think I do.

MR. LAMBERTON: But these are assumptions in hypotheticals.

THE COURT: It's an assumption and these are facts I will have to decide, what are facts and which is an assumption.

Q If you were to assume those things I just asked you, would you not agree that Mr. Flamia put together a pretty good deal for all parties involved?

A Mr. Ledwith, you have given me so many assumptions which you are referring to at this point --

Q You did a wonderful job.

I am saying to you now, didn't Mr. Flamia do for Sossner precisely what you did for that little shoe company or whatever it was, did he not get for it first of all

someone who could buy it then could invest a proper amount of capital and tools and run it successfully in the market, did he not also provide the expert guidance that the company would need, mainly his own services, did he not put together virtually the same kind of deal that you just gave us?

MR. LAMBERTON: This is a fact question.

THE COURT: He said assume it.

THE WITNESS: All right.

MR. LAMBERTON: Assume, your Honor, that is contrary to the facts. There wasn't any expert guidance whatsoever.

THE COURT: He said assume.

MR. LAMBERTON: The assumption is beyond the scope of the record.

THE COURT: I don't know Mr. Flamia's position, he was ready, willing and able to give that expert guidance if he would have been given the opportunity.

MR. LAMBERTON: This question that he gave --

THE COURT: I see, if his offer to do so hadn't been influenced greatly, according to the plaintiff, he would have given help, expert guidance, for whatever it was worth.

MR. LAMBERTON: There may be an obligation or

liability for not permitting Mr. Flamia to exercise that expertise that he has just quoted, but there's no question, there's nothing in the record to indicate what he gave us in expertise. In fact he couldn't exercise them because we wouldn't permit it.

THE COURT: That is the whole theory. You frustrated it.

MR. LAMBERTON: Mr. Ledwith is asking certain assumptions that in fact he provided expertise.

THE COURT: He tendered it.

MR. LAMBERTON: How can you tender expertise, your Honor, but don't know whether he's good or bad at managing or financing for machines or what he would have --

THE COURT: Lehman Brothers tenders it to you and we don't need you, Lehman Brothers will do this on our own is what he's asking. Would you read back the last part of the last question -

MR. LEDWITH: I'll ask it.

Q Would you agree that what Mr. Flamia did for Sossner on the facts that I have asked you to assume, is virtually the same as what you just told us you did for that little shoe company?

A No, sir.

Q Now you indicated Lehman Brothers' fee had been 5 percent of the first thousand and 4 percent of the next thousand?

A I wish it were, it's million.

Q Million. Then there came a time when that changed?

A Yes.

Q When was that change?

A I don't know the exact date. It's within the last couple of years.

Q What year would it be?

A I'm not absolutely sure.

Q Can you give us your best approximation?

A I would say perhaps the middle of '73, end of '73, beginning of '74.

Q At that time the fee arrangement changed to 5 percent of the first two million?

A That was my recommended fee.

Q Now, based on the facts that I have given you,--

MR. LEDWITH: Let me withdraw that.

Q You indicated that your opinion as to what Mr. Flamia's services were worth was based on the fact that you had placed him in a position where he would be acting as a finder working for a business broker, for example, Lehman

Brothers, would that be correct?

A I think it's a fair analogy.

Q So you are saying that the function that you allowed to Mr. Flamia and the function for which you gave him credit was to bring to the attention of the business broker a possible purchasing company for your client. Would that be fairly correct?

A Yes. I gave him the high end of the range because of his knowledge of the company.

Q Well we'll get to that a little later.

Basically the position of the parties to this story are as put it, is that correct?

A Yes.

Q Will you assume for the purpose of these questions there was no business broker and there was no investment banker involved in the transactions between the parties. Assume that the sole moving force for bringing it together, all of these parties, was Mr. Flamia. Will you assume that?

A Yes.

Q Will you assume that Mr. Flamia did in fact bring the parties together, thereafter the deal was consummated, would you assume that Mr. Flamia invested the time necessary to learn about Sossner, that he invested effort

necessary to locate the buyer, that he did have a great knowledge of the tap and tool industry to look for the proper buyer for the company.

Assume that also that he contacted expert attorneys and accountants to come up with a fair evaluation of the Sossner company. Assume that he was in a position of trustworthiness when he discussed this with the various parties, what he had in mind. Assume that he got the negotiations underway.

Now, with this in mind, would you say that Mr. Flamia performed the same function that Lehman Brothers would do entitling him to a full fee of 5 percent and not as merely a finder who worked for Lehman Brothers doing no more than dropping a tip?

MR. LAMBERTON: I object, your Honor. One of the --

THE COURT: I understand his assumption that he is making. I will determine whether or not they are accurate. I will let the witness answer the question. I understand your objection.

A Mr. Ledwith, no, I don't agree. I have answered that in a sense before.

You have assumed he acquired, he found a proper buyer. That doesn't mean that he checked the market and

found the best buyer.

Q Well, sir, the fact that the buyer bought and the seller sold, doesn't that indicate there was some compatability?

A That does not mean it was the best deal.

Q My question was does that show some compatability there?

A I would like you to define compatability?

Q That is a word you understand?

A I'm not sure I understand what you mean.

THE COURT: I think the two are looking at this thing slightly differently. You're looking at it from a seller standpoint, aren't you?

THE WITNESS: Yes, sir.

THE COURT: And one of the things that happened here, you must understand, that the seller is not the one responsible for the deal. The seller maintains -- the seller maintains he is not responsible for the commission. So, what we have here is a suit in essence by an alleged broker or joint venturer or against the buyer. And the question is not whether or not the buyer's market has been explored so much as whether the seller's market has been explored?

THE WITNESS: The other opportunities for the

seller?

THE COURT: Yes.

THE WITNESS: I don't know if any of those were explored. Then I would go to the question --

THE COURT: Have you represented that is how the defense --

THE WITNESS: I would say it's rare in these sized transactions. You normally represent the seller.

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THE COURT: I would think that would be the normal circumstances, you talk about the problems of buyers. What Mr. Flammia's concern was, if anything, as far as his proceeding, assume they have to go as joint venturers. His concern was providing the right company for OSG. If you follow me?

THE WITNESS: Yes.

THE COURT: Not vice-versa. He's not physically operating on behalf of Sossner or Mite. He was operating on behalf of OSG and himself.

THE WITNESS: Then I would find it would be quite a conflict in that point, if he was operating on behalf of them because I take it Mr. Ledwith's assumption that he had good advice that 1.6 million was the proper price to pay for this business. Why was he willing to have OSG put in two million plus additional capital without advising them in some way. That I don't know, whether he did or not.

THE COURT: You have to talk with this assumption that counsel for OSG pointed out. They discussed the fact he had offered 1.6 million and had been turned down. The seller had only been willing to sell for 2 million and in effect gave them that inside knowledge. He said to them, "Look, I tried once and

I couldn't get it for 1.6 million and I was on the inside track. I know it is available for two million. I think based on this brochure here it is worth two million."

Now the question is, is his service of some value?

THE WITNESS: Yes. I think that is of some value

THE COURT: If he has the ability?

THE WITNESS: Then the next question is how many companies are there in the industry and was there a study made of all of the companies that might be acquired. If it's an industry quite fractionated, only with a few large ones, with many small ones, and from what I've heard about sales in the last five years being relatively static, there might have been others available. Perhaps more favorable in terms of plans. Perhaps Mr. Plammia's desire was to get a company that he has spent some years with and understood and wanted to be President of.

THE COURT: All right.

Q If you were to assume that the Mite Corporation, the seller asked and indicated that what it wanted for its company, the Sossner Company was two million dollars.

Q We're starting with a new series of assumptions?

Q We're working on the same question, but I think this has been asked for. If you want to write it down?

A There's some of them.

Q That's what happens when you get into these things. Assume that these, Mr. Flammia got for Mite Company a buyer who would pay two million dollars. Assume you have an informed seller and assume you have an informed buyer, that the buyer knew of all prior transactions. Would you not say in answer to my earlier question that Mr. Flammia put together a very fine deal for both parties involved?

MR. LAMBERTON: Isn't that what your Honor in essence asked?

THE COURT: I didn't ask it this way. I will let him give his opinion.

A Do I assume that he put together a good transaction?

Q Wasn't it, isn't it in your opinion that he did a good job, he put together a good solid deal?

A One, he didn't negotiate it, to my knowledge. Two --.

Q Let me rephrase the question. Did not a good solid deal come out of what he did?

A A good solid deal depends on the future and you can judge that based upon what has happened and what is in

the future whether or not earnings were good. Whether or not the resultsas projected were realized and then, you know, whether you have a good solid deal. You don't know you have a good solid deal defining it as one that was successful for both parties, you don't know if it transpired until some time in the future. Especially if it's based on an assumption.

Q Let's put that aside for one moment: We will getback to this in a moment. As of the date of closing you had a happy buyer and a happy seller, as of that date, did you have that?

A Is that an assumption?

Q An assumption.

A If they were both happy you had a deal.

Q Of course, whenever you get into acquiring another corporation, especially from the point of view of the buyer you always have a great deal of uncertainty, is that not right?

A You try to have as little as you can. But you have uncertainty.

Q So the answer is yes?

A Yes.

Q One of the reasons because you never know what kind of a future the acquired company is going to have; is that right?

A One never knows what will happen tomorrow, that is correct.

Q So at the time of the closing nobody can say with prophecy or precise prophecy exactly what the acquired company is going to do, can you?

A No.

Q So part of the job --

MR. LEDWITH: Withdrawn.

Q Let's just touch on this first. You as an investment banker or business broker, it is your job as much as possible once you have the party somewhere near each other to soften all of the obstacles to an ultimate coming together, isn't that right?

A If it seems like an appropriate transaction, yes.

Q Of course, it wouldn't even be close to each other until you made that determination, is that right?

A I would say yes.

Q At this point the investment broker has to get in there and maybe push the seller, the buyer up a little bit in the price or maybe beat the seller down a little bit or maybe yield a little bit over here and on a tax matter or yield a little bit on the other side. Give and take, it could go on and as a broker this part of it, is that right?

A I would rather limit the push and beat,

essentially, yes.

Q Isn't that exactly what happens, push and beat in the psychological sense, of course?

A No, sir.

Q So once a business broker gets into the picture he then works hard to get bodies together?

A Assume you are close together, yes, like that, yes.

Q Now have you had occasion to represent a buyer where the buyer is in an acquiring company?

A I have been asked to represent buyers, yes.

Q Did you ever do it?

A Represented but did not close transactions.

Q But you are qualified to talk about buyers and what have you?

A To some extent, not having closed one I have had enough experience to understand their objectives, if that is what you're asking?

Q I will go back a little bit. When Lehman Bros. earns a fee, answering an assumption, it's been agreed the purchaserwill pay the fee. I apologize. The seller will pay the fee. Is it not to some degree customary in the brokerage fee, it is put to the purchase price?

A You mean added?

Q Added on the purchase price.

A No, sir. This is a negotiation. The price at which someone is going to buy a company is a matter of negotiation as you explained and part of the negotiation includes various assets. You may make representations as to what the balance sheet will consist of, it's a private company and in more cases it is more than not. In the case of a private company the individual owner pays the fee after they have received compensation for selling their business.

Q Let me ask you this: Is adding on a broker's fee onto the price, is that one of the ways of disposing of the fee?

A I never had that occur.

Q Well, is it one of the ways that the broker's f[illegible]ould be taken care of?

A If the buyer is willing to pay it, is that what you're saying?

Q Of course.

A Then the subject of what the business is worth comes --

Q Well my question is though, adding the brokerage fee to the purchase price, would that not be a way, one way to take care of a payment of the brokerage fee --

MR. LAMBERTON: He already asked that. It's

not in issue. No, it wasn't then, yes. And the question is it possible and the answer is, "Sure, anything is possible, almost --"

THE COURT: I understand the point. The seller can get the brokerage fee as well.

THE WITNESS: It's all subject to negotiation.

Q I'm asking would that not be one way to have the broker fee taken care of, yes or no?

A Would it be one way?

Q Yes.

A Yes.

Q Thank you.

A You can assume that is one way.

Q If the selling company were not to add the brokerage fee on top of the already agreed-to price and the selling company were to pay from its own monies, would not then the buying company be getting a company for its money which would have in evaluation of the purchase price less the broker's fee?

A I think what we're missing here, there is negotiations as to value.

Q Sir, if you could please answer that question?

THE COURT: What he's asking, after a bookkeeping standpoint. I get the point. It is not an unusual thing. It is a question of how you set it up

and how your books are afterwards for tax purposes.

MR. LEDWITH: All right.

Q Now we talked about the problem of uncertainty that a buyer has sometimes when they begin to get involved in one of these acquisition discussions. The reason why would it be correct to say that a prospective buyer has certain uncertainties because he doesn't know all that there is to know about the company to be acquired?

A Yes. As well as others, as well as the future.

Q As well as the future, indeed. Right. So would you say that if a buyer were to be interested in a certain type of company, that he would be well advised if he could, to retain someone who could investigate that company that he was looking at to find out asmuch as humanly possible in order to become an informed negotiator?

A An informed negotiator, an informed buyer.

Q Negotiator, then buyer?

A Well --

MR. LEDWITH: I'll withdraw "informed."

Q Informed buyer.

A Well, informed buyer would either have to have the knowledge itself or the capability within his own organization to make a decision on what to make an acquisition and understand the business or he would, if he was reasonable

and in using good judgment, would hire someone to help him make that decision.

Q Your answer is yes, I take it?

A It depends on the particular circumstances. There are, most large companies that do their own investing --

Q Assume the company that is doing the negotiation and eventually purchasing didn't have or didn't have on its staff people who could do the entire investigation. Would it not be well advised for that company to retain someone who would give that company a very good investigation report and a very good opinion as to the company, its future, its present value, its ups and downs?

A You're assuming that if the buyer did not have any people in his own organization and did not know anything about the company or the industry, would it be in its best interest to retain someone, I think the answer to that question is yes.

Q Assume that the company heard about a company that was available for sale. That it also discovered that the President of that company that was for sale had recently left the company. Would you consider it good business judgment to contact that former President and retainhim to find out what he has to know about that company?

A If they knew anything else about this business,

the first thing I would investigate is the reason for the departure of the President.

Q Answer the question, if you can.

A I would have no way of knowing.

Q My question, would you consider it good business judgment to go out and hire that President to tell you what he knew about the company; yes or no?

A I can't answer the question.

(continued next page)

MR. LAMBERTON: Your Honor, this is argumentative.

THE COURT: He said he can't answer.

THE WITNESS: Because there are an awful lot of things that would be involved. Besides it is not a question.

Q I realize it is a very complicated question. All right, now, be it good judgment or not good judgment, assume if you would that the buyer company did in fact go out and speak to the President, the former President of that company that they're looking at. Will you assume that?

A Yes.

Q And assume that the discussions about the company to be acquired evolved in such a way that the buying -- the possible buying company had indicated it had a desire to acquire a company just like the company that was to be sold. And assume that the former president of that company informed the prospective buyers as to --

MR. LEDWITH: I'll withdraw that.

Q Informed the prospective buyers as to a prime negotiation for the acquisition of the company. Assume he informed the buying company of the precise nature of the product that the company to be acquired had, that he informed them of the representations of the company.

That he then presented to the buying company a

forecast which he had prepared. Assume that forecast was identical to the one marked Plaintiff's Exhibit 20 which I think you had an opportunity to look at. I ask you parenthetically, you did have a chance to look at Plaintiff's 20, did you not?

A Yes, sir.

Q Did you look at it relatively thoroughly?

A I did not look at it. I looked at it, just read it. I did not examine it for every detail.

Q Do you have a good comprehension, idea of what is contained in it?

A I have a general idea of what is contained in it.

Q So assume that the past President of the corporation provided a forecast identical to Plaintiff's Exhibit 20 which gave projected needs, projected profit, projected sales. The name of some of the top customers and so forth. Would the services performed by that past president have a very real value to the buying company?

A His services would have a value.

Q And would one of the values that he gave have been that he would relieve an enormous strain on the buying company, that they might have a possible acquisition --

MR. LAMBERTON: Is this psychogically, your Honor?

THE COURT: He is asking monetarily, I assume.

THE WITNESS: Would it relieve some of the uncertainty, it depends on how much confidence the buyer has in the forecast. Depends on what and I don't see very much support for the forecast.

I don't see any analysis of the return on investment in terms of what you might get for the money you put in. As well as the additional capital. But, to answer your question it would give you some comfort, as we say, maybe cold comfort.

Q We agree there are some uncertainties about the acquisition, it would be removed by the facts I just asked you to assume?

A Well, some of the uncertainties.

Q Did it not?

A I said it gives you some of the information, but the uncertainty as you agreed, you don't know what's going to happen tomorrow. But it gives you some of the information that any potential acquirer that is duly diligent would want to know, plus other information he would want to know.

Q And one of the questions that comes to your mind is while the forecast is very valuable, provided the forecast has some credibility?

A Support, credibility and it is realized.

Q Your answer?

A It's a valuable tool if you can rely on it. If it had all the supporting documents that would go with it.

Q If the report had credibility, was believed, you could believe it, could it be a very important document to this prospective buyer?

A It would be an important document. It would be part of any of the documents that any acquirer would want.

Q Now if the person providing that forecast were the past president of the company of which the forecast was drawn, would that make it a little more credible than if someone else had provided it?

A You see, there are ambivalent feelings in my field as to objectives of Presidents. That is why I couldn't and on the earlier question he objected to, it is entirely different: his objects are different. One man may want to get to be President and one may want to seek an interest in the transaction at any cost as long as he gets back to be President.

Q Let me remove that problem from you. Assume that a report was not prepared for the purposes of giving it to the prospective purchaser, but it was prepared to advise the parent company of all of the strong points and all of the

weak points of the company to be acquired. That it was prepared for the parent company to advise it as to what influx of capital would be needed, what kind of machines were to be needed, how it would compete in the market. How it may fail without the proper capital. Would that give it credibility?

A It would further the degree of credibility. It would raise the question as I gather it did as to whether for the year ending, this is '77, the four-year sales volume was going up from just looking at the forecast and this is far in the future and it is very difficult to have a crystal ball that we can go up to. Remember, this company over the last five years had a relatively flat rate of increase and during that period the margins would go up from the forecast for the current year operating profit of $30,000 up to $400,000. If you then said the $400,000, you'd have to pay taxes on it. That would bring it down to 200,000 and in order to achieve that you had to put in $500,000 in equipment, then the owner might say what other sources or return do I have? Where should I make the investment?

Q That wasn't my question. My question was would the fact that I gave you make that a credible document, a believable one, not prepared for the purpose of inducing a buyer to buy?

A One of the assumptions made earlier dealt with

the fact that until money was put in by Mr. Flammia he felt this company would not grow and therefore his future was in question.

Q Sir, if you can, I understand you have been given an awful lot of assumptions. I would ask you to answer the question without going into everything else. With the fact that this document was prepared for the parent company of the company to be acquired, would that make that document a more credible document than if someone else had prepared it?

A It will be credible to the extent of the credibility of the individual who prepared it.

Q Now, if the person who prepared that provided it to the parent company and also provided it to the buyer company for the purposes of letting the buyer of the company know all about the company to be acquired, if he further went on to offer an investment of his own money, five per cent of the acquisition, would that further lend credibility to that document?

MR. LAMBERTON: I object, your Honor. These are facts contrary to the facts. The financial data was prepared by a subordinate to Mr. Flammia. Mr. Flammia apparently only prepared the front part. Therefore, to the extent of --

THE COURT: I'll overrule your objection. The question is does the document become more credible when the tenderer of it or proffer of the document offers to put money where his mouth is?

THE WITNESS: I would say yes.

Q You talked about motivation of the fellow giving this document to the prospective buyer. If you were to assume that the past president and provider of this document were to have given the prospective purchaser a complete and full disclosure as to his involvement with the company, his negotiation with the company, the offer made, the fact of what he thought the value of the company was and also the fact that purchase price would be two million dollars would that not give a prospective purchaser a greater feeling of uncertainty about the transaction which it may be getting?

THE COURT: You mean feeling of certainty?

THE WITNESS: Certainty, not uncertainty.

MR. LEDWITH: I apologize.

A It should.

Q And taking all these things together, would these things have an actual value to the buyer, a value that you could put a monetary figure on if you were to retain such a past president?

A If you, I'm sorry?

Q If you retained such a past president.

MR. LEDWITH: Let me withdraw that. That is a difficult question to answer.

A I couldn't have answered it that way.

Q Assume that all this information was provided to the prospective purchaser, including the offer of purchase along with the prospective -- along with the price they wanted and all the other assumptions I gave. Assume if the prospective purchaser was to say, "Thank you, we don't want you, we don't want your expert, but I would like to pay for what you gave us." Could you put a market value on what he gave, just yes or no?

A You are assuming that he was a consultant to the company; is that your assumption?

Q Right.

A No.

Q But you would agree it did have an actual value of something?

A Yes.

THE COURT: That is because you haven't studied it from that standpoint?

THE WITNESS: No. The way I look at it, the question, your Honor, as if he was retaining a management consulting firm or an expert to come in and

analyze the business.

THE COURT: The business has already been analyzed. The hypothetical he's putting in to you is the OSG is talking to a person who is a former president who has made an analysis in the form that you have before you, who is willing to put his money where his mouth is, so to speak, back it up. In the manner that has been indicated here and they said, "Well, fine, we'll go ahead and we will do the negotiation and if they come to complete the negotiations you will get something."

Are you able to put a value on it from that standpoint?

THE WITNESS: That would be very difficult. Let me give you by way of example, when someone comes to us for an acquisition and they say they would like to buy this company, will you negotiate and Lehman Bros., quid pro quo, would you come together and form a group of investors and you can be a member of the group. That is your compensation for getting in. You will have the opportunity to join if you think it is such a good investment.

Q The quid pro quo that you discussed has a value, right?

A Yes.

Q And its value would be given by the prospective purchaser to this consultant as you would characterize him?

A Yes.

Q But you are unable under the facts that I've given to you and these assumptions to put a market value on the services which I asked you to evaluate?

A If you bought a security and I went in --

Q Can you?

A I can't put an exact value because I don't know if the security, if it achieved the quid pro quo.

Q Now you as a business broker, you deal, I understand, primarily with the executive or management class of a company; is that right, of the seller company?

A Owners, management, yes.

Q When it gets down to the ultimate talking, nuts and bolts, you then get involved also with the executives or management or owners of the buying company; is that right?

A Yes, sir.

(continued next page)

Q Now once again, you indicated you did have some experience dealing with buyers or purchasers?

A Yes, sir.

Q Would it be a purchasing company coming to Lehman Bros. and sit down with you and say, for example, "We're interested in a company for say United States production of a certain type of product. We're willing to pay so much and we want that type of product to be manufactured. Could you find us the company," to use a scenario?

A That would be something how the scenario goes or it could go, we might initiate the idea to the company and they say, "That's a good idea. Will you help?"

Q Assuming the other way, the buying company did want a company.

A Right.

Q What would you do then, would you then use your unique talents to locate some of the companies that may be available?

A We would try and ascertain the buyer's desires and then we would attempt to study all the companies that we felt were potential, potentially met the buyer's needs.

Q Needs --

THE COURT: Then you would?

THE WITNESS: Come back to them with what we

thought were the companies.

Q Now just assume for the purpose of our discussion and by pure coincidence you had in your inventory available a company which fitted precisely to the needs of the purchasing company which came into your office. The instant that purchasing company began to talk about what it wanted it immediately clicked in your mind that what you're looking for is in this company and in your inventory. Will you assume that?

A Yes.

Q Assume that you were able to discuss this with the purchasing company and that within a month the entire deal was consummated. A letter of intent was signed and that you yourself exercised any expertise of your own. You have exercised hardly any negotiation whatsoever. When the parties got together everything was virtually agreed to. Would you say that you have earned your five per cent fee?

A In that circumstance, if we were representing the purchase or the acquirer, no. It would be unlikely he would have agreed to a fee and I think there might be a slight conflict in terms of, we had an inventory, when you say it was an inventory, we had an exclusive arrangement with the seller. If we had an exclusive arrangement with the buyer, he would pay us five per cent. If we had a normal five, four,

three, two, one.

Q Assuming an arrangement was made.

A And we knew there was a company available?

Q You knew the company and precisely what the company wanted, both seller and purchaser.

A If we put them together, that would be negotiated, depending upon the size of the transaction and the amount of effort and work that we put into it.

Q Well, now assume you did put the deal together without all that work through your efforts and the acquirer did acquire the other company in your inventory. That may not be a very precise way of putting it?

A Try to distinguish it.

Q I understand. Would you then not request your fee of five per cent?

A What is the size of the transaction?

Q Two million dollars.

A We may or may not. It depends on a lot of other circumstances.

Q Now when you --

THE COURT: Let's stop one second. I want to make sure I understand. Let's assume that this inventory is not exclusive. It is a past exclusive one that you have done all the work on already. One time

you represented the seller. It merely required an update, but your exclusive has run out and you have been fired as a representative. You're talking to a buyer and you realize what the buyer is looking for is just this company that you've just been fired by. You put all that time and effort that you say you put into these deals, which I think is perfectly understandable, you have to, you put it all in and brought the expertise in and this knowledge and delivered it to them, wouldn't you charge them the normal fee?

THE WITNESS: That's making an assumption that we have been fired and the terms are such.

THE COURT: No, you have no obligation any more to the seller, so to speak.

THE WITNESS: Your Honor, I would handle it a little different, and you are asking what are the circumstances when you no longer have an exclusive and something like this happens. We normally would call the seller, tell them we have someone and come in and we ask them, we would renegotiate for this particular deal.

THE COURT: You are no longer on the payroll, they've got no exclusive and the buyer says we want you to find us something and you realize this is the

opportunity. The question that is put to you, would you charge him a fee?

THE WITNESS: Yes. We would charge a fee. We would have to negotiate a fee.

THE COURT: Would you ask for five per cent?

THE WITNESS: We would try and get five per cent, but since we hadn't been specifically retained by this company to go out and search for a company, it is unlikely they would be willing to pay five per cent. We were not the only ones representing them in terms of that. If they came in and retained us, there might be a retainer fee and go out and look for companies for them. It would be negotiation against -- when you're getting into deals of this size, of two million dollars, it's pretty tough to make a lot of money out of that kind of transaction. There are a lot of expenses that were mentioned before when I think it was read from the book, your accounting book, there are legal fees, investment banker fees.

THE COURT: You have been through it, I know it.

THE WITNESS: And the cost of prosecution, it's pretty tough to get a big deal out of this size transaction.

Q Nonetheless, Mr. Lehman --

THE COURT: His name is not Mr. Lehman. I'm sure you would like to be.

MR. LEDWITH: I'm sorry?

THE WITNESS: It's all right.

Q At any rate, you were trying to get the five per cent and you would -- I correct the reason, you would try and get five per cent in your opinion for the services and they were worth five per cent?

A We would try and get the five per cent because if we don't get it, the way life is with lawyers and doctors and their reputation for doing satisfactory transactions and getting fair results, getting paid fairly, so if we felt our services were worth five per cent and we felt they weren't, we wouldn't ask for it.

Q Mr. Sternlieb, what is your answer?

A We would try to get five per cent if we felt our services were worth it.

Q The reason you would try to get five per cent because in your opinion your services were worth five per cent?

MR. LAMBERTON: That isn't quite the answer.

THE COURT: If they were, he said yes, if they were. I understand what he is saying. I think I followed him.

THE WITNESS: I can say one thing: If we tried

to get five per cent on a hundred million dollar transaction we wouldn't be doing too well.

THE COURT: Four per cent, three per cent, where do you stop?

THE WITNESS: It's usually one per cent. But that's for small deals, your Honor. The deal of the type we're talking about, when you get into large deals --

THE COURT: Of course.

THE WITNESS: They are negotiable wherein --

THE COURT: I see.

THE WITNESS: Everything is negotiable and the whole thing, the negotiations are not easy. With the negotiations coming up, we try to get as much as we can reasonably expect. If we didn't, no one would come to us and say I would like to buy a company. So everything has to be within reason.

Q Right, and also fair, as you said?

A Absolutely.

Q In your opinion, five per cent would be fair and that is why you would ask for it?

A That is an assumption.

Q No, your opinion. Would you ask for five per cent if it wasn't worth five per cent?

A No.

Q So if you were to ask for five per cent in a deal where the selling company has fired you, it was because whatever services you rendered in your opinion were worth five per cent. If you asked for it?

A You are making a lot of assumptions. If we felt our services were worth five per cent we would ask.

Q And the situation where the Judge said a selling company had you do some investigation for them, prepare all the documents and then fired you, then you found a buyer for the company, then you made the deal, then you asked for five per cent. Would it not be fair when you asked for five per cent, the reason why you're asking for that amount in your opinion is that your services were worth five per cent?

MR. LAMBERTON: Asked and answered, your Honor.

THE COURT: Yes.

MR. LEDWITH: I haven't gotten a yes. Is that a yes ?

THE WITNESS: Yes.

MR. LEDWITH: Thank you.

THE WITNESS: I assume, Mr. Ledwith, when you say five per cent we're talking of five per cent of the first two million, four per cent of the next million, is that what you mean?

MR. LEDWITH: Yes.

THE WITNESS: All right.

Q Now, sir, when you are retained by either buyer or seller, you deal with the executive people or with the owner or executive?

A Yes.

Q This is on both sides, when you get into a discussion you deal with executives on both sides?

A Yes, sir.

Q Now assume that you have been retained by the purchaser to locate a company. You then use your unique resources to then get a list of possible companies which may meet the needs of your purchaser.

A Yes, sir.

Q Now, would you then go to the executive of the purchasing company and present the list to them?

A Yes, sir.

Q And would you then go over each of the potential acquired companies and discuss each one of them with the prospective purchase company executive?

A To the extent we have information, yes, sir.

Q Of course, at that stage you don't have all that much information, but each of these companies is on the list?

A If they are public companies, we have publicly available information. If it's private companies, then reports or other forms that might be gotten.

Q All of this is really pretty much superficial information?

A All of this, not all of it, public companies, I would hope disclose more than superficial information.

Q But at any rate you say certainly you cannot make a determination as to whether or not you want to acquire a company on a Dun & Bradstreet report, you would like more --

A On a Dun & Bradstreet alone?

Q Right.

A No, I could not.

THE COURT: I would hope not.

Let me ask you this: We are getting towards a quarter to five and Mr. Osawa has to be called to the stand. How much longer are you going to be?

MR. LEDWITH: At any rate, we're at least another hour. That is at least.

MR. LAMBERTON: Your Honor, we would obviously like to finish with Mr. Osawa today. But if Mr. Ledwith continues --

THE COURT: You're not even going to finish with this gentleman.

MR. LAMBERTON: At the present time, why don't we set it down for one day --

THE COURT: You can't settle for one day with my time schedule. The question really is when can we reconvene?

I think next Friday is all right with me.

MR. LAMBERTON: We have Mr. Osawa. If he would get Mr. Sternlieb completed and do Mr. Osawa at the beginning of the week?

THE COURT: I know, but I have a criminal case in process and I have another one, a multi-defendant criminal case after that. If the Wall St. firms would wake up and see what Congress has done to them in the federal courts, maybe they could persuade Congress to repeal the Speedy Trial Act of 1974 and get this particular thing out of the way. They have deprived the litigants in this city of -- civil litigants of access to the federal courts by enacting the speedy trial act of 1974. If you don't believe it, you are going to see it affect you. They have practically mandated that we try nothing but criminal cases.

MR. LAMBERTON: Your Honor, I wish I had the power to change that.

THE COURT: I think the Bar Associations

ought to get together and say to them this is the kind of problem you have created for us. They won't let us use the judges.

MR. DEAN: I have a problem. I am supposed to be on trial in Denver that day.

MR. LAMBERTON: I have a scheduled examination in Chicago on that day.

THE COURT: I'm thinking primarily of Mr. Osawa when he can come back.

MR. LAMBERTON: He planned to leave at the conclusion of his testimony. He has his annual meeting in Japan Tuesday of next week, your Honor.

THE COURT: It is possible that one of the criminal cases would fold. I've got summations and charge for a jury that is on trial and I have to start a multi-defendant case on Monday afternoon while the jury is deliberating the case on the trial. The other case is going to be approximately two weeks.

MR. LAMBERTON: I have not yet consulted with Mr. Sternlieb.

THE WITNESS: I have a two million share public offering that I am going to and in fact they're waiting for me. I didn't think we would get here at two. As I was called out by phone.

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THE COURT: How long are you going to be bogged down?

THE WITNESS: I don't know. If you are talking about the 27th of February?

THE COURT: Yes.

MR. LAMBERTON: Your Honor, it seems to me we're now getting into a great many minor variations on the theme. Perhaps we can cut it below an hour.

MR. LEDWITH: At the rate we're getting answers from Mr. Sternlieb.

THE COURT: I think he is trying to be as cooperative as possible.

MR. LEDWITH: From my point of view, certainly Mr. Sternlieb is being a delightful witness.

THE COURT: I don't fault him. I certainly understand, at least I think I do. I don't know.

(Witness excused.)

(Discussion off the record.)

THE COURT: We will adjourn until February 27.

MR. LAMBERTON: Thank you, your Honor.

THE WITNESS: Thank you.

MR. LEDWITH: Thank you.

(Whereupon, these proceedings were concluded.)

* * *

AFTERNOON SESSION

cw/ss 1/1

THE COURT: Mr. Sternlieb, you are back on the stand and you don't have to be pre-sworn. You may proceed.

CROSS-EXAMINATION

BY MR. LEDWIHT:

Q Sir, if my recollection serves me correctly, you indicated that you are employed by Lehman Brothers firm?

A Yes sir.

Q And that your firm is a large investment banker or business broker generally speaking?

A Yes sir.

Q And in fact you personally are involved with mergers and acquisitions for small family businesses and you sell and achieve liquidity for these kind of firms?

A Among other responsibilities as well.

Q Is that your primary function, as I understand?

A I don't know that I could call that a primary function.

Q That is what you said you did?

A It is one of them.

Q And now I think you also agree with me that Mr. Flammia, is certainly no --

MR. LAMBERTON: Objection, your Honor, to Mr. Ledwiht's assumptions. He cannot go into matters

of which he has no personal knowledge. He has no personal knowledge of Mr. Flammia and his activities. He can't assume certain facts, and --

THE COURT: I don't think it is. Let us hear the full question.

MR. LEDWITH: I didn't finish the question.

Q Would you agree, sir, that Mr. Flammia from the facts you've been given and asked to assume certainly is not a Lehman Brothers?

A Would I assume that?

Q Would you agree to that?

A Yes.

Q And he is also not a Alan Sternlieb?

A I don't think two people are the same.

Q However, you were called to this Court to listen to certain facts and to give your fair opinion as to a fair evaluation of the services that Mr. Flammia gave based on certain hypothetical questions that you received, is that right?

A Yes sir.

Q And in fact you are fully prepared to give us your fair opinions?

A Yes.

Q And would it be correct to say you have not come

here with any preconceived notions about a selling figure and you are prepared to listen to whatever you have to hear?

A Prepared to listen to whatever I have to.

Q Now you indicated to us the last time we were together what the procedure is generally that Lehman Brothers follows from the time you first get a client or customer more or less, up to the time of the sale and correct me if I am wrong -- I think you said you started off that when a client comes in you indicate it's usually a seller and you indicated to that client you would prefer to deal on an exclusive basis and thereafter have an interview with him and try to understand the goals of that seller and that you thereafter make an investigation to learn about the business and then you would draw up a detailed memorandum which would contain a history of the business, his financial lists, for the five years prior with explanations for the variances on the balance sheet including matters to do with inventory, return on investment, and what have you, and I think you said -- am I correct so far?

A Yes sir.

Q I think you said thereafter you would draw up a formal document which would contain your full and fair evaluation of the business, after having done that you would then look for the start -- to look for a buyer and in this

connection you would seek out individuals who would find prospective buyers for them. Is that correct so far?

A No sir.

Q Just correct me at that point.

A Well, when you said I would prepare a document -- that would give a fair evaluation of the business. If you mean by evaluation, do you mean -- no, our documents do not attempt to put a value on the company. It attempts to describe the business.

Q That is what I understand?

A I just wanted to be sure that we understood the same thing. The second point is sir -- you have to read back.

Q After you were preparing this document, which is not necessarily an evaluation, monetarily, but generally, overall you are now prepared to start your quest for a prospective purchaser?

A I then said, we would go to people to seek --

Q All right, at this point you have certain individuals who would act as finders for your firm who could give you prospective names or files of prospective companies who might be interested in an acquisition or merger?

A No sir, in that sense we do not have certain individuals that we just call to ask them for ideas that are outside the firm of Lehman Brothers. We normally would work

within our own organization and hopefully come up with recommendations as to prospective buyers. It is not our procedure to go outside the firm to look for ideas.

Q Correct me if I am wrong, didn't you indicate when you talked to Mr. Lamberton that you, after having drawn up this final document, you would look for a buyer and you would seek individuals to find buyers and draw up a list of prospective buyers, did you say that?

MR. LAMBERTON: Your Honor, I object. If he wants to know what Mr. Sternlieb testified -- I don't have any problem with going over these things if he's asking Mr. Sternlieb now to recall what he testified to two weeks ago, it seems to me that has no probative value. It's merely an exercise in recollection. If he wants his direct testimony as to what Mr. Sternlieb, Lehman Brothers, or investment bankers customarily do, Mr. Sternlieb is available, not what he testified to three weeks ago.

THE COURT: This is cross-examination. He can testify to a certain degree. I'm not quite sure what his purpose is. You have to give him a certain leeway.

A The answer to your question is if I understand it, is that we would just utilize a list of prospective buyers. We would consult within the firm of Lehman Brothers, members

of the firm, associates and partners and hopefully come up with a list that is a pretty good one of prospective buyers for businesses.

Q Assuming you didn't come up with any prospective buyers, would you then go outside your firm to find someone to act in the capacity of finder, or whatever?

A Mr. Ledwiht, I'd say that I can't make that assumption. I'm sorry.

Q I'm not asking you to assume. Tell us what you do.

A I've never had such an occurrence.

Q All right. At any rate, thereafter, you would make discreet inquiries after having reviewed this list with your principals, with the buyers, and hopefully arrange a sale. Would that be about correct?

A Yes, that's a short version.

Q Now, you indicated that your fee for doing this work and consummating the deal would be 5 percent, 4 percent and 3 percent, and all the way down?

A Yes.

Q And didn't you testify, as best as you can recall two weeks ago, that if you did utilize a finder, depending upon how helpful that person was, that that person would get a percentage of Lehman Brothers fee. Is that

correct?

A That's correct.

Q So then, on $2,000,000, ordinarily, your fee would be $90,000, at least in 1973?

A Yes sir.

Q In utilizing the finder, if that finder was helpful to some degree, you would give that finder your fee ranging from 5 percent to 25 percent depending upon how helpful the client was?

A You are correct in saying 5 to 25 percent.

Q Now this finder that you would pay, would this ordinarily be a fellow that is a partner of Lehman Brothers firm or an outsider?

A

A Outsider.

Q Then after having heard the question posed to you by the other lawyer, you said that the value of the services performed by Mr. Flammia, was in the range of $20,000 to $25,000?

A Correct sir.

Q And now, would it be correct to say that he earned, would have earned that $20,000 to $25,000 by being the one who would advise Lehman Brothers of the prospective buyer?

A Could have worked either way.

Q Well, what I am getting at in the hypothetical question given to you, if you indicated the value of the services?

A That's right. If you want to look at the proper point of view, he brought in the seller or was able to bring in the buyer and I think that either case that would be a fair evaluation.

Q That is, he would have earned his money had he been acting for Lehman Brothers as finder, if he came to you and gave you a name for the company that might buy or sell and the deal did click, he would then be entitled to these 20 or $25,000?

A If he performed the services as I understood them, yes. If he just gave us a name, he would be at the low end of the scale.

Q That would be what?

A 5,000, 10,000.

Q In your experience, did you ever have occasion to pay an outsider more than 25 percent of your fee, or Lehman Brothers fee?

A No sir.

Q Did you ever pay anybody 25 percent of Lehman Brothers fee?

A I can't recollect sir.

Q May I just ask you as best as you can, what was the largest percentage of Lehman Brothers fee that your firm ever paid an outside finder?

A Can't answer that question sir.

Q Do you ever recall any amount ever paid to an outside finder in terms of percentage of Lehman Brothers fee?

A I can recall some percentages of agreements where we had an agreement with a finder and understanding what the arrangements were and the deal had been consummated and we had an agreement. In one particular case, and I think we agreed to a percentage that might vary from 5 to 15 percent.

Q What was this fellow's responsibilities?

A It wasn't a question of his responsibility. He introduced the client to us, he delivered them to us, and he was able to bring them, deliver them, they were ready for a sale -- convinced them along with our services that they should sign an agreement utilizing Lehman as their exclusive agent in exploring possible mergers of their businesses.

Q In essence, this would be in the nature of -- like a forwarding fee?

A What?

Q Forwarding fee.

A I don't know what a forwarding fee is.

THE COURT: He's not a lawyer.-- it's an

expression used legally.

Q Now going back to our hypothetical situation involving OSB -- should a seller corporation such as Mite Corporation, come to your firm and indicate they wish to sell their wholly owned subsidiary, Sossner, your first order of business would be to obtain an exclusive with them. Is that right?

A Yes sir.

Q And then, you would commence your investigation?

A Yes sir.

Q Now just assume that your staff was totally preoccupied with other matters and that you were not equipped at that time to make an investigation with the problems that were requested and that you were obliged to retain an outside partner or firm to do this for you, okay?

Could you give the Court your best opinion as to what would be a fair and reasonable compensation to this outside firm for their thorough investigation of the firm?

A I'm sorry. I can't make the assumption, sir, because we don't take on the job if we can't do it because when we are retained to do a job, it is Lehman Brothers that is retained and not Lehman retaining someone else to do the work.

Q On $2,000,000, your fee would be $90,000. Is

that correct?

A Yes sir.

Q Can you allocate what portion that Lehman Brothers would have earned by the investigation that they perform of their own clients' company?

A No sir.

Q Can you give us your best opinion, just in terms of percentages now?

A Well, I would say if you want just a gestimate -- I would say that we would feel we have performed an investigation and preparing a memorandum -- which is I think the subject you are directing your attention to, something in the area of 20 to $25,000 in a transaction of that size.

Q So, that would be roughly one-fourth of your fee is earned by the thorough investigation that you would make?

A I'd say going back to 1973 -- it really isn't fair to even make that assumption. Probably wouldn't be fair to try and break it down into component parts but it's the usual agreement we had at that time. We received nothing unless a transaction was consummated so, I don't think it's fair to try and break it down -- too difficult. I'd be just gestimating.

Q I can understand. Just say that however, you

will agree when a deal is made that Lehman Brothers did in fact earn 100 percent of the fee. Will you agree?

A Yes.

Q And your best gestimate as you say, would be that that 25 percent of your fee roughly, would be earned by the thorough investigation that you performed?

MR. LAMBERTON: Objection, your Honor. The witness has said he in effect withdraws. He cannot make an estimate.

THE COURT: I think we are getting into something -- are you saying as in the case of a contingency fee as where a lawyer takes a fee on a contingent basis where it is very difficult to fix a dollar amount.

THE WITNESS: I am not sure I follow your example, your Honor.

THE COURT: If you find on the first three deals that you get -- $2,000,000 say, the first two deals, $2,000,000 deals, you spend $25,000 worth of work and you get no consummation. And the third deal comes along and you spend $25,000 worth of work and you get a consummation. So you got $75,000 invested in the three deals and you make a $15,000 profit on the last deal. Isn't that in essence what you are

saying?

THE WITNESS: Yes sir. And I can also say that sometimes you work for a deal to earn a 90 or $100,000 fee that may be two years in working.

THE COURT: That's right, but you are saying is that the percentages vary and time varies so contingency factor -- that's an impossibility to evaluate them?

THE WITNESS: That's absolutely correct, sir.

THE COURT: I think I understand.

Q Nonetheless, the investigation of the firm, the understanding of the goals is one of the very essential parts of your function?

A Yes sir

Q I'm going to ask you if you could, assume that you didn't have the time or the staff to undertake these discreet inquiries you talked about earlier and assume that you wouldn't have them done unless you could do them yourself.

A We would not.

Q However, would you agree that these discreet inquiries is one of the very important functions of Lehman Brothers?

A Mr. Ledwith, everything we do is important in consummating a transaction with a sale of a business.

Q Are you able to give in terms of 100 percent of your job, a percentage of importance that you allocate to the discreet contact with the potential buyers?

A Mr. Cahill, I think the Court has expressed it better than I could in saying that it is impossible to place an arbitrary amount on any one function in any one transaction because they vary on each one tremendously. I think it would be impossible to place a value.

THE COURT: If you went back and historically, and found out what happened in each case and worked it out to a number of positives, so to speak, I know it would be a mammoth size job and what you came up with --

THE WITNESS: Your Honor, we recently, with a new head joining Lehman Brothers are attempting to do that and finding it very difficult to try and allocate. In the investment banking business we do not work on an hourly basis and we don't charge on an hourly basis. It is usually on a transaction basis.

Q I take it then, we can dispose of that question by saying you can't put a figure on it. Certainly the discreet inquiries and in talking about prospective buyers is a very important function, but you can't put a number on it?

A Yes.

Q I take it that your firm has its own staff

counsel expert in the field of mergers and acquisitions as you have also a staff of accountants who are also experts in these areas?

A I would appreciate the definition of staff counsel and staff accountant, sir.

Q Lawyers and accountants who work for Lehman Brothers, work with you and for you?

A We have available to us such resources whether they be employed by Lehman or whether we employ them or use them on the outside.

Q There may well come a time where you reach a certain level in your own investigation and now it is time you feel you should get a professional view, would you then retain outside counsel and possibly outside accountants to assist you?

A In terms of what type of question, sir?

Q In terms of your efforts as a Lehman Brothers man, to assist you in heading an acquisition or merger?

A We may, if we feel it's essential or usually our client has his own counsel and his own accountant and we make use of them if they are conversant with this type of transaction, and our or we may recommend to our client that he retain special counsel who is quite familiar with the type of transaction contemplated.

Q Is there ever a time Lehman Brothers hires an attorney to assist Lehman Brothers?

A I'm sure we do, but I have not done so in the field of mergers and acquisitions to date.

Q Was there ever a time when Lehman Brothers retained an accountant to assist Lehman in the work?

A I am sure we do. I don't know that we retain them specifically on a project. I know that I have the ability to call accountants who are friends of mine. They are senior members of accounting firms who in terms were to call me when they have a question and I will call them when I have a question and Lehman has an accounting firm that does our own work and we have access to that firm should we need to ask a specific question.

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Q I guess your answer is yes -- I'm not really sure.

A Yes.

Q When you do get help either legal or accounting assistance, do you pay for it?

A It's a friend of mine. If it's not a friend, I don't know exactly how that's handled in terms of the firm we deal with. I assume they are on a retainer of some type with Lehman Brothers but I know I have access through normal procedure.

Q Well, let me just rephrase the question. Should you require a lawyer or accountang to help you consummate a deal, do you have the authority to first of all ask for such assistance on a compensation basis to get assistance and then pay them professionally?

A I have never done so.

Q Do you have the authority to do so should you need it?

A I would probably clear with Lehman's attorney who is our head counsel if I were to call for a lawyer which is the normal practice within Lehman Brothers. And, I never have any questions brought to me about compensation. I have nothing to do with compensating an outside counsel. I have made occasional calls to the accounting firm and the question

of compensation has never come up.

Q Do you in fact have employees who work for Lehman Brothers who are lawyers and accountants?

A Yes.

Q Have you ever had occasion to consult one of these gentlemen to assist you in putting a deal together?

A Yes.

Q These people I take it are paid by Lehman?

A Yes sir.

Q That you would consider legal and accounting assistance that you received either from your own fellow employees or the outside counsel as an important part of your structuring a deal?

A Everything is an important part if you leave out one of the ingredients.

Q The answer is yes?

A The answer is it has some importance.

Q Would you assume this -- would you assume that a buying company is interested in acquiring a production facility on the East Coast. The primary goal is to have a company it can use to manufacture a specific product.

A Yes.

Q And if you were to find that you are having difficulty persuading the prospective buyer to look into your

client's company because of the --

A Excuse me, I didn't follow that.

Q I'm sorry, sure. Assume that you represent, first of all the selling company, is that correct?

A Yes.

Q Assume that you have a prospective buyer, prospective has expressed some interest in your client's company, that the prospective buyer has specified their interest but then backed off because there were too many open questions in this potential acquisition, too many questions that could not be satisfactorily asked and answered -- would you also assume that the president of that company that your buyer may want to buy, recently retired only three months before you reached this point and assume he was available to act as consultant to either Lehman Brothers or to the buyer to answer any of those open questions. Would you consider it a good business practice to retain the services of that man to assist either you or the buyer in learning the vital information it requires to consummate a deal?

A Mr. Ledwith, I think I answered that question at our last session and the answer was no, I don't think that the man would necessarily be the right man. There are an awful lot of ingredients besides that that you want to know before you retain someone.

Q Would you consider it a good business practice to consult with this man?

A I would first want to find out all the facts about the individual, the circumstances of his leaving, his motivations, desires, what he's doing and giving my good business judgment, I would want to consult him, yes, I would consult him.

Q Assuming that there was no other place you could get these answers, assume there was only one source of the information, would you then consider it good business judgment to consult with this man?

A I would find it very difficult to assume that you could only get it from one source. I think there is one thing missing from your assumption that you are talking about. We are representing the seller?

Q You are, yes.

A And you are saying what I think the buyer would be well versed to consider retaining this gentleman I would have to also assume the buyer has looked at every other production facility on the East Coast and made a complete survey of the businesses to make sure this is the right one.

Q Actually, you put in factors into the case and you are modifying the question. Please don't assume that.

A I would have to because that would be good

diligence. You are assuming these people are intelligent and therefore would have to make the assumption they would just not look at one facility and make a deal. We would attempt to understand the industry, what other companies might be available and look at it.

Q I take it then your answer to the question is that under certain circumstances you might consider it good business practice to consult with the president, former president of the company to be acquired?

A Yes sir.

Q Now, would you assume that in fact the buying company did consult the president, the former president of the company that was acquired, assume that there were many open questions about the company to be acquired, and assume that the president, the former president answered all of the questions and led by his information to some degree, to the ultimate acquisition of the company. Can you consider his services to have been of some value to the buying company?

MR. LAMBERTON: I object. It seems to me now he is making assumptions contrary to the facts. I don't believe these assumptions are accurate reflections of the record.

THE COURT: They don't give a complete statement of the record but they are close enough to allow him

to obtain this man's opinion on cross-examination. Might not on direct examination but on cross, I will allow it.

THE WITNESS: Could you repeat the question.

Q Assume that the buying company did in fact use the past president of the company to be acquired, as a consultant, that the answers that were present in the buying company's mind were asked by the former president and assume that the answers that he gave, the information that he supplied, led ultimately to the acquisition of the company of which he was former president. Would you say in your own opinion whether or not you think his services, acting as consultant, had any value?

A I would say they had value depending upon the correctness of the answers and the information given and the results that were achieved.

Q Your answer would be yes it had some value but you can't put a number?

A May have been a negative value or possible value.

Q You actually think that would have a negative value?

A Absolutely. There could be cases where there could be a negative value.

Q We already have assumed the buying company was looking for a production facility and that the buying company wanted a company which could manufacture a specific product. Assume that some of the questions in the buying company's mind had to deal with profits, inventory, increased productivity, automation, cost control, delivery techniques, and a line of related products, how the plant space of the company to be acquired was utilized, what the personnel situation was, what was the calibre of the people, what was the overtime situation, assume these were all questions that were in the mind of the people who were considering acquiring the company and assume that the former president supplied this information, had answered each and every one of these questions with a great deal of specificity relative to the strong points of the company as well as the company's weak points, and assume that this former president advised the prospective buyers of the outstanding problems they might be getting into should they make this acquisition and assume these problems included such information as, since the market report was submitted there was every indication that a price increase had materialized in our industry and that this price increase is expected to be about 3 to 6 percent that he would tell them he believes their selling methods were archaic as are the methods of the entire industry that various ideas

have and are being considered but nothing can be done with these ideas due to the fact that the company to be acquired had a heavy backlog, delivery problems, archaic price structures. Assume that he pointed out to these people that the company to be acquired had submitted requests for rebuilt machinery, that the request was denied, that the grinders, were over 20 years old, that more equipment is needed to continue the various operations to enable the company to schedule and handle increased volume. Assume he advised this company of that information among other information, and assume that those problems that were pointed out by the past president received a response from the potential buying company --

A Assume the problems received a response?

Q Right. These problems were pointed up to the buyer and the buyer evaluated the problem and then actually made a response to the past president.

A Yes.

Q Assume the response was positive that our financial strength for the acquisition of Gossner Tool equipment more than met any requirement that the financial strength would come from the Japanese, and that we agree with you and believe that OSB acquisition of Gossner could be very meaningful through our Japanese production capability

to furnish all the pickets grinders et cetera and we can turn around and solve the problems you have outlined in your proposal in quick order and make this division a major factor in the United States tap and tool. We believe we are the only ones capable of doing it because no one has the additional production capabilities to immediately meet the Sossner needs. Would you assume the problems were pointed out and this was the response that the buying company gave to these problems. Would you say in your own opinion that the information supplied by this past president to the buying company had some value?

MR. LAMBERTON: Same objection, your Honor. The assumption is contrary to the facts.

THE COURT: I will allow it.

THE WITNESS: Your first assumption sir was that Lehman Brothers represented the seller is not correct?

Q Well, let's just step away from that.

A I think that it's a very important ingredient in my answer.

Q No, let's talk specifically about the question I gave to you as I gave it to you.

A You gave me a series of assumptions and I asked you if we represented the seller and you said yes. If that

is your assumption then I can say in terms that you agreed, much of it, if not all of it would have been obtained and would have been included in a memorandum that we would have prepared and given to the prospective buyer.

Q Would you consider this part of your function, acting as a broker, to be an important part of your job?

A Preparing a memorandum with the information?

Q Right.

A Yes sir. In conjunction with management, as I stated before, we would prepare that.

Q Would you say that the services that you rendered to your customer would have a very real value?

A I think I explained that the value to our client was the total picture and all parts of it have a value. Each step has a value.

Q Now, ordinarily when you as a Lehman Brothers man do draw up the memorandum and you do finally get to talk with the potential buying companies, do you make a point to point out each and every bad factor or bad feature of the company that you are trying to sell?

A We attempt to give a fair presentation of the facts.

Q Try, and do you make a point to point out each one of the bad features about the company you are trying to

sell? Just yes or no.

A I can't answer yes or no.

Q If you can, let us now assume that Lehman Brothers was the representative of the selling company. Let us just assume that the company, the buying company heard about this company heard it may be acquired and in fact retained the former president of that company. I ask you to assume, if you will assume these are the only factors you have before you, would you say in your own opinion that the services that the president gave on what I told you he told them, and based on what I told you, was there response to what he told them, would you say the information he supplied had some value?

MR. LAMBERTON: Objection, your Honor. I don't understand the form of the question. It's incorporation by reference of some prior conversation.

THE COURT: I understand. I will allow it.

THE WITNESS: I think you are asking if someone was retained to study, I think to study a business and give the information whatever they agreed upon, has a value -- would be a value and they would be paid based upon what they agreed.

Q That wasn't what I asked. If they retained the past president of the company they intended to acquire and that

the past president advised them of all of their strong points and all of the weak points of the company they intended to acquire and that they then knew each and every intimate detail and that they responded to the problems that were pointed out to them with a very firm offer, would you say that the services supplied by that past president had some very real concrete value? Yes or no.

A Yes, I would say they had a value. I would like to add as you used the word he was retained and if he was retained, there must have been some understanding under which he was retained.

Q That wasn't part of it -- wasn't given.

A You said he was retained.

Q I didn't say anything about any agreement.

A You asked if it had value.

Q Tell you what -- in order for us to shorten our discussion today, please, if you can, try not to assume factors which are not given to you in the questions.

MR. LAMBERTON: Object to that. You said retained and I think retained has a specific meaning.

MR. LEDWITH: I wish to withdraw, your Honor, or modify. It seems to me the question would be perfectly proper.

THE COURT: It's a matter of semantics. I

understand the contents.

Q You indicated in one of the things that you would consider to be important is for the buyer, either by himself or through Lehman Brothers, should look into the entire industry to find out about all the companies that may be available before making any option. Isn't that what you said, generally?

A No sir, I said he should look into it. If Lehman Brothers is representing the seller, we wouldn't. If we are representing the buyer, we would specifically look into the entire industry.

Q Just talking from the buyer standpoint. It is your opinion that you should look into the entire industry before making any judgment?

A Yes sir.

Q I assume, and correct me if I am wrong, that you yourself have never handled a deal involving a tap and tool industry?

A That's correct, sir.

Q I assume, and correct me if I am wrong, that you yourself don't know anything about the tap and tool industry, generally?

A That's right, sir.

Q So I take it also not knowing anything about the

tap and tool industry, you really can't give a judgment as to what we can advise a buyer should do?

A Yes I can, sir, because you have told me or I have heard and been asked to assume that it is an industry with roughly a hundred million dollars in sales, several large companies, and many small companies, so, I can make the assumption it would be the correct thing for any buyer not to make a decision based upon one look at one company, but to evaluate what other companies might be available in the industry and then make a decision, a well informed decision.

Q Based upon that assumption you cannot say at this time what the buying company knew about the other companies in the industry, can you?

A No sir, I have no knowledge.

Q And would you agree with the statement that a hundred million dollars in sales in one entire industry nationwide, makes the industry rather small?

A That was a statement made to me, sir. I have no idea because I don't know the industry.

(Continued next page.)

Q I am saying the industry itself, having total sales nationwide of one hundred million dollars makes the industry itself, in relation to all other industries, a small industry?

A I could accept and reject it. I could give you examples several ways if you like. The assumption it is a small industry fine, that's upon yourself.

Q It's not a terribly disagreeable assumption?

A No sir.

Q Now, assuming this someone or some firm other than Lehman Brothers performed each and every one of the functions that we just discussed, all right?

A Assume that -

Q Functions that we just discussed running from the evaluation and investigation into the business that's to be sold, the preparation of a thorough and fair report about that business and the utilization of legal and accounting talents, the seeking of prospective buyers, the discreet inquiry to the buyers, the supplying of detailed information relative to the company to be acquired and then as a consequence of all these services that were performed that interest was expressed in the acquisition and that within approximately one month of the information being given to the buying company, that the actual acquisition occurred. Would

you then say it is fair and reasonable to say that that person or firm was similarly entitled to this same fee that Lehman Brothers would be entitled to?

MR. LAMBERTON: I object, your Honor. That one contains within it one of the largest distortions of the record that is that there was the use of expert legal and accounting talents. The record discloses legal and accounting talents. You have called one purchase price which was $400,000 less a fair value for Sossner Industries and therefore to say that the legal and accounting talents were used in connection with a $2,000,000 offer seems to me a severe and distinct distortion of the record.

THE COURT: I will allow it. You may answer.

THE WITNESS: No sir. My answer is no, he has not performed all the services that Lehman Brothers has.

Q Well sir, when you were answering the questions that were asked of you by the other lawyer, you did set forth certain things that Lehman Brothers did to earn the fee.

A Yes.

Q You set forth those things that Lehman Brothers did and then you concluded with what Lehman Brothers' fee would be?

A That's correct.

Q You set forth each and every item that I just described to you and no more when you talked to the other lawyer?

A That's not correct, sir. You set forth additional items.

Q When the other lawyer asked you questions about -- let's go back a little bit. Did he ask you to evaluate the finder's fee value and did you not say 20 to $25,000?

A Correct, sir.

Q Did he not then ask you generally, how do you arrive at this figure?

A That's correct, sir.

Q Did you not respond generally that you -- generally here is your procedure -- that you like on an exclusive basis that you want first to understand the goals of the seller that you then want to learn about the business, that before you invest any time you insist on an exclusive so as not to waste time and then that you undertake a study, that you draw up a detailed memorandum that includes a summation relative to financial information, for the last five years with explanation for variances that you then look into the balance sheet, that you then draw up a document bearing an evaluation of the business and you then look for a buyer,

that you seek individuals to get a list of prospective buyers and that you then talk to the seller discuss it and undertake discreet inquiries and that your fee for doing all of this once a deal is consummated, is 5 percent, 4 percent, 3 percent, as of the year 1973. Isn't that generally what you told the other lawyer when he asked you?

MR. LAMBERTON: Your Honor, I think this is a classic example of asking and answering.

THE COURT: It's cross-examination.

THE WITNESS: Mr. Ledwith, two things, if I may. One, you yourself said I believe that the exclusive relationship and having an agreement and understanding was part of what I said you did not include. One thing that I omitted is the negotiating the transaction. Two items you elicited from all of the things we would have done.

Q All right, with that, we have a complete list?

A I would say that is generally a complete list.

Q Didn't we just finish discussing each and every one of these items except the negotiations?

A And the exclusive arrangement.

Q And the exclusive arrangement. That broadly covers it?

A Yes sir.

Q Having done that, you get a fee of $90,000?

A Yes.

Q If someone else does, he should be entitled to the $90,000 less whatever the value negotiating has?

A A little while ago we went through the question of how do you break down the value and I said it's almost impossible to break it down. The negotiating may result in a deal without all of the other information. You can have everything else you described but unless you are able to negotiate, you have nothing and I am saying it's all part of the package. In some transactions, the negotiations can be easy and simple and in others transactions, it can be hard and difficult and it is very difficult to evaluate any one part.

Q If the negotiating had been done properly to complete the deal by this firm -- I'm not asking you to assume, I am just asking a hypothetical, would you then say the list would be complete?

MR. LAMBERTON: Your Honor, I would like to find out at the present time is the assumption and there are some floating around the Court and it is very difficult pinning them down, is Mr. Sternlieb presently representing a seller or presently representing a buyer?

MR. LEDWITH: That isn't the question.

MR. LAMBERTON: Objection. Mr. Sternlieb has been testifying to two different things.

THE COURT: Let us not argue the point. Let's go back to the question.

MR. LEDWITH: I beg your pardon. The question is he's representing a seller.

MR. LAMBERTON: Your Honor --

THE COURT: He can answer that.

THE WITNESS: I am really a little confused. If you are saying someone did exactly what Lehman Brothers did if you are assuming that they would have done what Lehman Brothers would they should receive the same compensation Lehman Brothers would have -- is that your question?

Q Yes.

A If he had agreed to if he had a letter of exclusivity and arrangement and understandings he would be entitled to what ever was agreed upon.

Q We went over a list of various services that Lehman Brothers performed. That now, assuming if each and every one of the items that Lehman Brothers did or does, including negotiating had been performed or that then complete the list of things that Lehman Brothers would do to

earn the fee?

MR. LAMBERTON: Your Honor.

THE COURT: He has answered the question.

MR. LAMBERTON: Your Honor, I would question that counsel is directed -- I am confused.

THE COURT: I am not confused. I understand.

MR. LAMBERTON: It varies between buyer and seller.

THE COURT: He put the seller into the picture.

MR. LAMBERTON: Pardon, but the case we have here is where it's --

THE COURT: All right, but he can cross-examine as to what he does when he's representing a seller.

MR. LAMBERTON: Yes indeed, your Honor. All I want to know is is this a case involving a buyer?

THE COURT: I know this is a case involving a buyer, you brought that up last week at another point in time. No reason why we can't have cross-examination on the subject. I wish you would move along.

MR. LEDWITT: We'll get to that in just a moment. We have to finish this item first.

Q Just assume one more thing if you would and we

will get off this. Assume that this past president attempted to buy the same company himself, and assume he went through negotiations, that he discovered what the importance was to be discovered, what the condition of the sale was to be, that he knew what the requirements of the selling company were and that he advised the buying company each and every one of these items and within a month after the advice was given to the buying company, a sale was completed, all right?

A Yes sir.

Q And he had negotiations on his own behalf but not between the two principals that ultimately were involved. Would you then say his services had very real value?

A Are we making these assumptions in addition to the other assumptions?

Q I withdraw the question.

Would you say that would be satisfactory information to complete your requirements for negotiating?

A I am sorry, I really don't follow that.

Q Surely. One of the items that we left open was the negotiations that Lehman Brothers would ordinarily have performed?

A Correct.

Q What I am trying to do is draw a comparison

between what this past president gave to the company that was to make the purchase and actually negotiating between the principals. You understand?

A Yes.

Q If the past president had already done the negotiations himself on his own behalf and transmitted this information to the buying company, wouldn't that be enough to satisfy your requirements to the giving of the negotiation skills to the company on behalf of the other side?

A I understand. The example of the surgeon who operates once, I wouldn't want him to do brain surgery on me. I think that's the same answer. I don't think the same thing, no sir.

Q A brain surgeon who operates only once had to have education and skill.

A That is, I would think he studied and spent many years at studying his skill of surgery.

Q Should the $90,000 fee have been earned by anyone on behalf of the seller, would it not be one of the practices, possibly for that $90,000 fee to be added onto the purchase price?

A Would it be one of the practices that would have been added onto the purchase price?

Q Yes.

A All depends on the negotiations as to who pays the fee and as I recollect, we were representing the seller. If the seller is interested in what he received net, if he has an agreement with you -- what he then nets?

Q Should he ever pay the $90,000 finders fee that was to now be absorbed on the bottom line --

A You said finders fee?

Q I'm sorry, Lehman Brothers' fee.

A If he had a contract with us to pay us $90,000 in a transaction and it was consummated, he would pay us $90,000.

Q He came to you and told you at the outset he wanted a bottom line figure of $2,000,000 or he would say don't bother bringing any people to us at all. Would you then have to construct a deal that would give him a net of $2,000,000 and have the purchaser now absorb the $90,000 fee?

A In the example that you gave and referring to the facts and information that I garnered, the first thing we would do is to judge whether it would be worth our time to invest in attempting to get a net of $2,000,000 and we also have to assess if it is of that value. When arranging, I don't think anyone is smart enough to know when a ten or 5 percent arrangement or exactly what that business is worth. As I have testified at the last meeting, the future gives us

the answer as to the value so that any client that we represent and I can't remember one, except in one case where a man said I have got a firm figure. And that is the only place I will do a deal and that was one out of many many examples.

Q I am asking you to assume, and there is no flexibility, that $2,000,000 is precisely what the buyer or seller wants. Would you then have to make some kind of an arrangement to get your fee paid?

A If we were willing to represent that -- no, if we are representing a seller, our obligation under the assumption you made would have to be to get a price that would include our fee so that he could get a net amount but, I am not sure we would have represented that particular client and that circumstance.

Q Assume that you did represent him. That is what you would have to do?

A Correct.

Q You told us that you dealt to some degree with family -- sorry, with small businesses. Now have you had much dealing with publicly held businesses as being your clients, you yourself personally?

A Yes.

Q So that you know publicly held companies may

well have a wholly owned subsidiary they desire to sell?

A Yes.

Q And they may come up with a package deal in preliminary discussions which may seem like the sale would be a good idea. You can envision that occurring, can you not?

A Yes sir.

Q I am talking about the executives of a publicly held company they would be the ones who get the ball rolling before referring to a board of directors or, would that be the case?

A I think that the board would approve the consent of selling of a division before the executives would do anything unless the staff is a minor part of the company.

Q But before any serious discussions would get underway, the executives ordinarily, would present a full quota or a full prospectus of how the deal would occur, what the price would be -- that sort of stuff. The board of directors or to the chairman?

A No, not to the chairman -- it may or may not depending upon the importance of that particular section of the business to the whole.

Q Ordinarily executives would be the fellows who discuss or talk with the other side and then present a presentation to the board for approval after?

A Executives would do the talking to either side -- what is the other side?

Q If a company would sell its subsidiary --

A Yes.

Q There was a company interested in purchasing the subsidiary.

A Yes.

Q Would it not be the job of the executives of the potential selling company to talk to the executives of the inquiring company to work out what may well be the grounds for a sale?

A Yes. If they were doing it themselves, absolutely correct.

Q Then they would present this to the board of directors?

A For approval, yes.

Q And if they were to undertake this and give it to the board of directors, they would present a package if they hope to have it approved, in a light that the sale to be was an agreeable type of sale and if the board of directors were to give this potential sale to the shareholders, they would want to present this sale in a favorable light?

MR. LAMBERTON: Your Honor, I wonder about the relevance. I object to this line of questioning as

irrelevant.

THE COURT: Yes, I think we are being irrelevant.

Q Isn't it a fact that at the time when a sale of a business is discussed that an evaluation of the business is agreed upon and then in order to make the sale palatable to the board of directors or shareholders, a premium is added onto the purchase price?

A Premium over what, sir?

Q Over the initial evaluation as to the value of the business.

A You are talking about a division of a public company?

Q Yes.

A I think if the public company wanted to get rid of a division they will consider what value it is to them and what potential return they might get from this division as opposed to selling it and redeploying assets elsewhere to see what the return on investment would be. I think they would do what anyone else would do. They try to get a fair price.

Q Do you recall when Mr. Lamberton read an excerpt from a book to you about this very point?

A Yes.

Q And do you recall that book saying simply we have a publicly held company involved and that a premium may be added onto the purchase price from between 5 percent and 25 percent?

A That was a publicly held company and a premium as I answered the question, if it is the same question, was referring in my judgment to a premium over the market value of a publicly traded security and not to a non-traded division.

Q At any rate, though, when a company that owns a subdivision or division intends to dispose of that company or sell it, that sale would have some effect on the stock of the selling company, would it not?

MR. LAMBERTON: Your Honor, I again object to the relevancy. I don't understand.

THE COURT: Sustained.

Q Just quickly, on a $2,000,000 sale, assuming that there is a premium of 5 percent that would be $100,000?

A Premium for what, sir?

Q A premium to sort of sweeten the pot I suppose you call it in the vernacular, to make the sale more appealing.

A If you are talking about a division, I have no way of assuming a premium --

Q Okay, a premium over the asset value or the premium over the amount of the selling company's investment in the division?

MR. LAMBERTON: What is the question, your Honor?

THE COURT: I think I understand.

A It's very simple. If management has attached a premium of 5 percent over the original investment, the amount of the sale is the difference.

Q Similarly, a premium of 25 percent over the investment in the company would be $500,000, is that correct?

A You are doing the arithmetic.

Q Surely, fine. Did I tell you what the investment value was?

A You said $2,000,000 or implied it.

Q Yes, could you consider it a good business judgment, a good business move if you could to somehow save that premium by paying a person who could save you that premium in the amount of $30,000 --

MR. LAMBERTON: Objection, purely theoretical.

THE COURT: Overruled.

A I would like you to repeat the question.

(Continued next page.)

Q If there was a person who had the skills and the knowledge, the contacts or what have you, to somehow effect a deal so that there would be no premium where ordinarily there might be, might well be a premium of $30,000 to $500,000, would you be willing as the businessman or would you be willing to recommend to a businessman to pay that man the $30,000 in order to save $100,000 or $500,000?

MR. LAMBERTON: Object to the form of the question. The assumption is clearly contrary to the facts.

THE COURT: Overruled.

A Mr. Ledwiht, if your question is would I pay $30,000 to save $500,000, the answer is yes.

Q Thank you sir.

A I don't know what relevance it has.

THE COURT: If you came up with a different answer I would have trouble understanding.

THE WITNESS: I just don't understand the relevance.

Q Okay, getting back to our assuming. Would you assume once again ---

A This is a new series, sir?

Q Well in conjunction with the others, sir.

A Still representing a seller? I don't know how

far back we are going.

Q Tell you what -- let's not have you representing a seller. Let's just have the buyer and the past president of the company talking, okay?

A Fine.

Q And all I am asking you to do now is give an0 opinion as to a businessman who hires or knows about these facts, all right, thatthe president, the former president of the company is in contact with the potential buying company and that he gives the potential buying company certain information that there is a company that it may acquire which may satisfy the desires to have a production facility on the east coast, all right? Assume that the initial reaction is, well, from the buying company -- well, we intend in a couple of years from now to get into the buying of a production facility. We didn't have the proper plant to do that however tell us more. And assume that further information was supplied and also assume that the question arose and let us stop here for a second. Would I be correct in saying to you in the business world when a company ventures off into a purchase, that that company has a duty of making a very careful investigation of the company it proposes to buy?

A I would say that's good diligence and judgment and that should be their obligation.

Q And ordinarily, the selling company presents the subsidiary in as good a light as possible?

A I would say they would present all the facts because normally there are counsel involved who request for a great deal of representation as to the facts.

Q Talking about initial discussions?

A Yes.

MR. LAMBERTON: Asked and answered and basically immaterial. I don't know the relevance but it's certainly immaterial.

THE COURT: I don't know the relevance either. I will allow it to a certain extent.

Q Assume that all of the serious questions as to what kind of businesses might be available to the buying company, as to what the strong points, what the weak points were, and so forth were all answered in thorough depth by the past president, so that when the discussions were completed and when the past president has supplied the company, the buying company with information as set forth in specific -- you have looked at it, have you not?

A Yes sir.

Q And that the buying company now knew precisely what it's getting itself into, knew precisely what it's getting itself into, would you not say that the past president

provided very real and valuable service?

A He provided a service, yes sir.

Q Assume much of that information was supplied to the prospective buying company that he then introduced the partners to each other and that a letter of intent to purchase was entered into between approximately a month thereafter, would you say then that the services he provided to the buyer were of great value?

MR. LAMBERTON: Your Honor, I object and pursuant to Rule 403 this is unreasonable and cumulative. It has already been employed over two weeks ago and earlier today and at the present time we are not getting any more relevance that will aid the Court, to aid its determination that it ultimately must make.

THE COURT: I must say you have covered this. Judge Markowitz said to me once, "Counsel, you don't have to draw pictures all over the wall."

MR. LEDWITH: Okay, I got the picture.

THE COURT: I am not saying you are the only one doing that sort of thing. All my life I have been accused of the same thing.

Q Let me ask a similar question, not with the same purpose. When the management of a company gets involved

in the very very initial stages of a possible acquisition, talking now about the buying company, that set of executives or executive have an obligation of spending their time and their efforts in investigating the company to be purchased, is that right?

A Correct.

Q Not only that as you say, those executives have the obligation of checking what other courses are available if they are diligent and good executives, to spend time and efforts to examine other companies available too?

A That's correct.

Q Without being overly repetitious, this investigation to find out whether or not the facility met their needs, ordinarily calls for visits to the facility?

A Yes, it might.

Q It would entail travelling at times, would it not?

A Yes sir.

Q And it would also involve a looking at the place, the kind of property it holds, machinery and all of that -- to have to investigate all of this before making any decision?

A Yes they would, Mr. Ledwith.

Q Would you agree, should someone be in a

position to advise the executive as to a specific company that might meet precisely the needs and give them precisely the inside information even before they leave, would you not say that person saved them a good deal of time?

A I'd say he may have saved them some time. I looked at your exhibit and having looked at it it appears to me to be a relatively standard form that was prepared by the company to give to the parent company. It is numbered in such a way I would have thought the parent company wanted to provide the buyer and if there was an interest the parent company could have just explained it right out. The normal thing would be to divulge the information because people will come in and find out anyway.

Q Assume the parent company did not or would not give the information to the buying company. They gave up a proforma balance sheet and that's all they got. Would not that past president's services have saved the buying company a good deal of executive time?

A Mr. Ledwiht, the answer to your question is yes.

MR. LEDWIHT: I have no further questions, your Honor.

MR. LAMBERTON: Can we take a three-minute recess while I consult with my colleagues?

THE COURT: The Court stands in recess.

(A five-minute recess was taken.)

THE COURT: Proceed.

MR. LAMBERTON: Your Honor, I would request a few questions on redirect examination.

THE COURT: Proceed.

REDIRECT EXAMINATION

BY MR. LAMBERTON:

Q Mr. Sternlieb, you indicated that you had examined Plaintiff's Exhibit 20 which is the, "fiscal year 1973-1974 forecast", is that correct?

A Yes sir.

Q And does that document supply the information that is customarily supplied the investment banker and others who work in the field of mergers and acquisitions for purchase or sale of corporations?

A No sir, it is incomplete.

Q In what respect?

A One, it does not give -- I think I answered this in some of the other questions -- I'll try and repeat.

Q If you can, just summarize.

A One, it does not give any historical operating data. Two, it does not explain, since it doesn't give why the data was the way it was.

Q What?

A Why the data was the way it was. In other words, explain why you had good margin or bad margin or explain why profits were up or were down or there were losses. It does not discuss who the customers were, it does not discuss what might happen -- new losses. It does not discuss what else may be -- let's put it this way, it doesn't go into a complete analysis of the industry. It talks a little bit about competition but not fully.

Q You testified about this on cross-examination. Would you summarize briefly putting together in one place the nature of the services that would customarily be rendered to a seller by somebody who was experienced in acquisitions and the mergers practice?

A One, we would first attempt to have an arrangement and understanding that we would represent them on an exclusive basis. Number two, we would try and understand the objective of the seller, whether it be a parent company or a group of individuals.

Q So often it's been a long answer, I would like to chance the question. You have indicated you are active on behalf of the seller. Would you please give me it if you were retained by a buyer to find a corporation. Would you please summarize for me the activities that would customarily be performed on behalf of the buyer in finding a likely

acquisition candidate?

A Well, we would try and have some type of understanding on compensation at the beginning so that we don't have any problems later. The first thing we would do is try and understand as best we can what the buyer's requirements are, what he's interested in, what his objectives are. Sometimes we can change the objectives and sometimes we find -- well, the best way to go about achieving those objectives, assuming we understand the objective, and they decide they want to get into a certain industry, we would then attempt to get the names of all companies in the industry, get as much information about the companies that we could and present that to the prospective buyer. If we had ample information as might be the case, in some public companies, we might proceed to contact them on behalf of the buyer. We would try and enumerate them in the order of our choice so we know which ones we like to approach them with first and then we would go about contacting the company and seeing if they would be receptive to a transaction, learn more about their business, do diligence, prepare a memorandum describing the business as completely as we can. And then, if our client says go ahead, attempt to negotiate a transaction.

MR. LAMBERTON: Thank you.

(Continued next page.)

RECROSS EXAMINATION

BY MR. LEDWIHT:

Q I think you said this forecast, Plaintiff's Exhibit 20 is incomplete from Lehman Brothers' point of view?

A IS that a quostion of statement sir?

Q That is.

A I said from the point of view if we were representing the company and we were to prepare a memorandum to sell a business, that would be very much incomplete.

Q Of course you never heard any mention in this case that Mr. Flammia was acting in the capacity of a Lehman Brothers was he? You didn't hear that, did you?

A That he was acting in the capacity --

Q Of a Lehman Brothers or investment banker?

A Mr. Ledwiht, if you are assuming -- it appears to me you try to make the comparison of all of the things that were done which is what Lehman Brothers would have done.

Q The thing we asked you to assume, was that Mr. Flammia in fact performed certain services.

A You are asking did he attempt to act like a Lehman Brothers -- I don't know whether he attempted to act like Lehman Brothers.

Q You also heard that the company that was inquiring was in the tap industry, did you not?

MR. LAMBERTON: Your Honor, I think this is beyond the scope of redirect.

MR. LADWIHT: I asked to assume earlier that the company which was doing the inquiring was in the tap industry.

THE COURT: Talking about something you asked previously or something Mr. Lamberton asked? I don't think Mr. Lamberton asked.

MR. LAMBERTON: I made no such inquiry.

THE COURT: If it's related to what he asked --

MR. LEDWIHT: This has to do with the incompleteness of the forecast.

THE COURT: All right, I will take it.

THE WITNESS: I don't think anyone told me that I can recall, to assume. I don't think you asked me to assume.

Q All right now, assume that the company that was to do the inquiring was in the tap industry and assume it was knowledgeable about the tap industry.

A Right.

Q So with that, assume there wouldn't be any necessity for discussion in the forecast about the industry generally, would there?

A Mr. Ledwiht, I think that you are asking for my

opinion..

Q Sure.

A Yes, I think that if you are going to do a professional job you do the job right.

Q Would you also assume that besides presenting Plaintiff's Exhibit 20 to the potential buying company that there also discussions that went on in which information was exchanged. Would you assume that?

A Yes.

Q I ask you that is it not possible that the information requested, the information you alluded to may have been discussed?

A Mr. Ledwiht, I would find that difficult to answer yes to because I would find it difficult to say that someone discussed operating figures for five years and was able to examine them and make conclusions of what had happened in five years or ten year period on the basis of just discussions. I know I find it difficult to do that. I like to look at the numbers, see them, have them presented before me, have the ability to ask questions over why sales went up or down, why labor was up or down over a five year historical period and then to have the same type of project for the future so we can look at a balanced five year history, five year proforma and understand the question. I don't think

that could have been done orally.

Q Let me ask you this -- assume that the only information that was provided to the buying company was the discussions that went on between Mr. Flammia and the buying company and the presentation of this forecast and the only other information that was supplied to the buying company was the proforma -- the possible buying company, was the proforma financial statement given by the selling company to the buying company. -- did you see the proforma?

THE COURT: You had it over the lectern at one point.

(Mr. Ledwiht hands to the witness.)

Q Which has been marked Plaintiff's Exhibit No.

A Normally Mr. Ledwiht, when the term proforma is used it explains proforma for what -- this does not tell me.

THE COURT: Assuming all you had in your possession was the exhibit and the little red book.

Q And the discussions went between Mr. Flammia and the principals of the inquiring company -- would you say it was fair to say it was a more persuasive factual information which was given to the buying company was the information Mr. Flammia supplied rather than that document?

A Mr. Ledwiht, I don't know anything about what took place in the discussions so I can't comment on the

discussions. If you are asking me if there are more information in these three pages than this booklet, I would say there is more information in the booklet.

Q I am saying, assume the buying company got before the actual letter of intent was signed from the selling company in terms of discussions, would you say that Mr. Flammia's information was a good deal more informative, persuasive.

MR. LAMBERTON: Object. In order to know what went on between OSB and --

THE COURT: I understand all that. Let him answer the question. The question is in a limited area.

A You are assuming that is all they have, very good, all the information they have?

Q Yes.

A I'd say that in answer to your question is there is more information in the booklet as I said than there is here. Now my personal judgment is I could not make a decision to buy a company or not make the decision on the basis of this information on either this or that, on the two combined.

MR. LEDWITH: No further questions, your Honor.

THE WITNESS: Thank you, sir.

581A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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G. T. FLAMMIA,

Plaintiff,

-against-

MITE CORPORATION and O.S.G. TAP AND DIE, INC.,

Defendants.

- - - - - - - - - - - - - - - - - - - x

73 Civ. 1571 (TCP)

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, plaintiff and defendants hereby stipulate that plaintiff's claims against defendant MITE Corporation be and they hereby are dismissed, with prejudice, but without costs to any party. This stipulation is without prejudice to plaintiff's assertion of its claims against defendant O.S.G. Tap and Die, Inc.

Dated: New York, New York
April 19, 1976

CLEARY, GOTTLIEB, STEEN & HAMILTON

By _____
Attorneys for Defendants
MITE Corporation and O.S.G. Tap and Die, Inc.

HANOPHY & LEDWITH

By _____
Attorneys for Plaintiff
G. T. Flammia

SO ORDERED this day of April, 1976:

_____
U.S.D.J.

582A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

G. T. FLAMMIA,

Plaintiff,

-against-

MITF CORPORATION and O.S.G. TAP AND DIE, INC.,

Defendants.

- -x

73 Civ. 1571

MEMORANDUM AND ORDER

July 14, 1976

PRELIMINARY STATEMENT

In his amended complaint plaintiff sets forth two claims, the first for $200,000 for an alleged breach of a joint venture agreement between him and the defendant O.S.G. Tap and Die, Inc. ("OSG") "in that(among other things) it (OSG) ousted the plaintiff from the opportunity to purchase a percentage of the ownership of Sossner (Tap and Tool Corporation) and O.S.G. refused to provide plaintiff with the position of president or chief operational officer of Sossner on the terms agreed to in the joint venture agreement" and the second for $200,000 in that "defendants in refusing to compensate plaintiff for the services he rendered have been unjustly enriched" and that he is entitled to recover from the defendants on a quantum meruit basis.

Plaintiff's original complaint was the subject of summary judgment motions by all parties, which motions were decided in an opinion dated October 6, 1975 by this Court.

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Defendants' motion for summary judgment was denied; plaintiff's motion for partial summary judgment as to defenses based on the statute of frauds and the Real Property Law was granted and plaintiff was granted leave to amend his complaint. (401 F.Supp. 1121).

None of the parties having demanded a jury, a trial was had by the Court on December 15, 16 and 17, 1975, on February 6 and 27, 1976, and on April 16, 1976.

PLAINTIFF'S HISTORY

Plaintiff, a 56 year old high school graduate, started working in the tap and tool industry in 1937 and with the exception of two years in the Armed Forces of the United States has been engaged in such industry with one company or another all of his life.

In 1948 plaintiff went to work as a factory superintendent for Sossner when it was a very small business consisting of approximately 25 employees and with sales of approximately $110,000-$125,000 per year. Shortly thereafter, plaintiff was made a vice president and became a 10% owner of the company. In February of 1967 plaintiff was elected president of the company and he occupied that position until he resigned in the Spring of 1973. During the period between 1948 and 1972 under plaintiff's management Sossner's sales rose to in excess of $2,000,000 per year and the number of the company's employees increased to 99.

In 1973 there were approximately 25 to 30 manufacturers of taps in the United States with gross sales aggregating approximately $100,000,000. Among these were five or six major companies with the remainder being companies of the size of Sossner.

In 1967 the stockholders of Sossner, including plaintiff, sold their shares to the Helicoil Corporation and in 1970 the defendant Mite Corporation ("Mite") acquired Helicoil, including its subsidiary Sossner.

As indicated above, plaintiff continued as president of Sossner at a salary of $35,000 per year and in 1972 he was placed on an incentive basis which yielded him an additional salary or bonus of $5,400.

During his years with Sossner, plaintiff developed an "electra" process and an "electra-lube" process, which, according to the plaintiff, contributed to the unique character of Sossner's product.

In 1972 plaintiff prepared plans for the future of Sossner which required additional investments in the subsidiary by Sossner's parent company, more automation and additional product lines. The plans also proposed the acquisition of other companies producing comparable tools. In his discussions with the management of the parent Mite company plaintiff was unable to persuade them to accept these plans and it became clear that such management was unwilling to invest more than the annual depreciation of Sossner's plant and equipment in each of the succeeding future years. It was

plaintiff's opinion that such decision would require Sossner to remain a relatively stagnant company with little possibility for further growth and development.

Accordingly, plaintiff, late in 1972, commenced discussions with the management of the parent company regarding the possible acquisition by him of Sossner. On their recommendation, plaintiff consulted lawyers and accountants who, after examining the financials of Sossner, recommended that he offer $1,600,000 to such management for Sossner. Management's reply was that the parent company wished to retrieve their investment in Sossner which was an amount slightly in excess of $2,000,000.

Discouraged with this entire situation, plaintiff resigned as president of Sossner effective March 31, 1973.

THE ACQUISITION OF SOSSNER

In April of 1973 plaintiff formed a new tap corporati known as the Pioneer Tap and Tool Corporation ("Pioneer") and a the same time presented, without success, to one or more other companies in the business the facts with respect to Sossner and his proposal to acquire the same.

In May of 1973 plaintiff went to a trade convention in Chicago and while there visited the offices of OSG to inquire about the possibility of OSG's supplying semi-finished taps to Pioneer for further finishing and resale. After lunch, while conferring with OSG vice president Robert Zoppelt, plaintiff brought up the question of the possible acquisition

by OSG of Sossner from Mite. When the suggestion was made Mr. Zoppelt took the plaintiff into OSG's president's office (i.e., the office of Terry Osawa), where the three of them discussed the matter for the next two hours.

At this critical point the testimony of the witnesse produced by the parties became sharply divergent.

Defendants' witnesses, while characterizing the conversations as "non-specific", "generalities" and "kibitzing did admit however that the advantages and disadvantages to OSG of acquiring Sossner were discussed; that the acquisition pric of $2,000,000 was discussed; that plaintiff's participation to the extent of "doing something together" with them by investing $100,000 in the Sossner stock was discussed; that the problem of OSG finding management to run Sossner was "solved" by plaintiff's indicated willingness to assume such responsibility; that there were discussions about OSG's "philosophy" of making sure that their executives did not receive less than they had previously been paid; and that a number of their comparable executives were making as much as $100,000 a year.

Plaintiff testified that he furnished to OSG's management a copy of his forecast for Sossner's fiscal 1973 and fiscal 1974 (Exhibit 20) and reviewed various aspects thereof with them. He further stated that he permitted them to make copies thereof and while this was being done it was suggested that a check should be made to determine whether Sossner was still for sale.

Accordingly, plaintiff attempted to telephone Mr. Leo Brancato, Executive Vice President of Mite, at Mite's Connecticut office. He was unsuccessful at first but either later that day or on the next the plaintiff talked to Mr. Brancato and advised him that he knew of a company that might be interested in Sossner and asked whether the company was still for sale. Mr. Brancato indicated that Mite was not actively seeking a buyer for Sossner but that he would nevertheless mull the matter over.

Plaintiff reported this conversation to Messrs. Zoppelt and Osawa and testified that they stated that they wanted to study his forecast (Ex. 20) and would be in further communication on the next day, May 15th.

Defendants' witnesses denied having received plaintiff's forecast (Ex. 20) during the conference of May 14t or ever having seen such document before early June of 1973, and claimed they never paid any particular attention to the same.

Plaintiff further testified that on May 15th he received a telephone call from either Mr. Zoppelt or Mr. Osawa instructing him to proceed further with his negotiations with OSG. Plaintiff said that during this telephone conference he asked whether it would be all right to reveal to Mr. Branca that the interested purchaser was OSG. He was advised that this was agreeable.

Plaintiff testified that he accordingly called Mr. Brancato again on May 16, 1973, and furnished him with OSG's name, and was again advised that Mr. Brancato wanted

time to mull the matter over and that he would let plaintiff know.

Thereafter plaintiff returned to his home on Long Island and wrote two letters under date of May 17, 1973, one to Mr. Osawa at OSG and the other to Mr. Brancato at Mite Corporation. In his letter to Mr. Osawa the plaintiff said, inter alia, that he had spoken to Mr. Brancato again and told him that OSG was the interested party after his "phone conversation with Mr. Zoppelt on Tuesday (May 15th) afternoon, wherein he authorized me to act in your company's behalf".

On May 24, 1973, Mr. Zoppelt replied, thanking the plaintiff for such letter and setting forth the following very significant paragraph:

> "We agree with you and believe that the OSG acquisition of Sossner could be very meaningful. Through our Japan production capabilities, ability to furnish automatic thread and flute grinders, etc., we can turn around and solve the problems you have outlined in your proposal in quick order and make this division a major factor in the US tap market. We believe that we are the only ones capable of doing it because no one has the additional production capability to immediately meet the Sossner need."

In that same letter Mr. Zoppelt indicated his company's interest in Sossner, informed plaintiff that OSG could handle the deal financially, stated that Mr. Osawa's father would probably want to visit Sossner's facility, thanked plaintiff for making contact with Sossner, and stated that he looked forward to "hearing the results of your discussion with him (Brancato) on May 23 or 24".

Also on May 24, 1973, plaintiff talked with Mr. Brancato again. Plaintiff claims that Mr. Brancato asked him for the names and addresses of the appropriate officers at OSG which plaintiff gave to him.

Thereafter, plaintiff communicated with Mr. Zoppelt a number of times and indicated that Mr. Brancato was going to send Mr. Zoppelt a balance sheet and an income statement of Sossner, which Mr. Brancato did with a letter dated May 30, 1973 (Ex. 8).

In a letter dated June 2, 1973, from plaintiff to Mr. Zoppelt, plaintiff stated that "rather than confusing the possible deal", he would delay his decision to begin the manufacturing and selling of tools by Pioneer.

On June 4, 1973 plaintiff wrote Mr. Brancato suggesting that if Mite and OSG should make an agreement for the sale of Sossner, plaintiff would be entitled to a finder's fee. In a letter dated June 6, 1973, Mr. Brancato replied flatly rejecting such proposition and stating that Mite never authorized the plaintiff to act on its behalf and the plaintiff would have to look to the buyer for any possible finder's fee.

Following the receipt of this letter plaintiff called Mr. Brancato. Plaintiff testified that the reason Mr. Brancato gave for the rejection of his proposal was that it was his understanding that plaintiff was to be a participant and president of Sossner, and that he (Mr. Brancato) felt that a finder's fee was not in order because of these facts. Mr. Brancato denied giving this reason, stating that he did not know at that time that plaintiff was to be a participant and

president of the company. At the same time, however, he did admit that the plaintiff discussed with him his (plaintiff's) future with Sossner.

On June 11th and 12th Messrs. Zoppelt and Osawa came to New York to see the Sossner facility. Plaintiff made reservations for them at a hotel, met them at the airport, went out to dinner with them and took them back to his home on that evening. Plaintiff did not go to the Sossner plant with them at the specific request of Mr. Brancato, who did not want to "shake up" the employees at the plant.

During the course of this visit, Mr. Zoppelt asked plaintiff to set forth in writing the deal between them. Accordingly, plaintiff prepared a memorandum dated June 13, 1973 (Ex. 14) in which, among other things, he stated that he expected a salary of $36,000 as president of Sossner and that it would take a little time for him to make the appropriate sales of securities to raise the $100,000 required for his 5% share of the stock of Sossner. Mr. Zoppelt testified that he read the memorandum and advised the plaintiff that he had "blown himself out of the ballpark" but at the same time he admitted that he questioned the plaintiff about the notation with respect to the time to raise the $100,000 investment. He also admitted that he advised the plaintiff that he would talk to Mr. Osawa about plaintiff's memorandum.

Plaintiff testified that some time between the delivery of the memorandum and July 3d he had a talk with Mr. Zoppelt in which it became evident that Mr. Warren J. Demory (then the president of Sossner) was under consideration for the presidency of the company. Plaintiff said that at this point he asked Mr. Zoppelt why he did not hire him for two years at $50,000 a year since he was not going to be made president of the company, thereby saving OSG a $100,000 finder fee.

On July 2, 1973, Mr. Zoppelt asked the plaintiff to come to Chicago. After one or more discussions they met for breakfast on July 4th. At that meeting Mr. Zoppelt handed plaintiff a letter dated July 3d offering the plaintiff the position at Sossner as a vice president in charge of manufacturing at a salary of $30,000 per year, with the provision that he work out the conditions of his employment, including the term of his contract, with Mr. Demory who would be his immediate superior. Thereafter, in discussions with Mr. Demory plaintiff requested at least a two-year contract; Mr. Demory offered only a one-year contract, which plaintiff rejected.

In the meanwhile OSG negotiated with Mite for the sale of Sossner and with Mr. Demory for his services as the chief executive officer of Sossner.

On June 27, 1973, OSG and Mite signed a letter of intent, and on August 1, 1973, a closing was had wherein OSG purchased Sossner from Mite.

In an attempt to minimize or negative the services provided by the plaintiff, Mr. Zoppelt testified that neither the real estate, the inventory, the cash, the accounts receivable, the employees, the foreman or the executive officers of Sossner nor the fact that it was an operating business was important to OSG's agreement upon a purchase pric of $2,000,000 or in its decision to buy the company. Only Sossner's good will, name and reputation entered into such decisions, according to Mr. Zoppelt.

THE NATURE OF THE FLAMMIA-O.S.G. RELATIONSHIP

Prior to the trial plaintiff took the deposition of the defendant OSG by its vice president, Robert L. Zoppelt, who testified that:

1. He had authority to bind the corporation in contracts; to employ and discharge employees; to discuss wages and salaries; and to undertake negotiations for the purchase and sale of subsidiary corporations (Ex. C, p. 4).

2. On May 14, 1973, at a meeting between OSG's president (Terry Osawa), himself, and the plaintiff,

> "I told him (the plaintiff) if the numbers work out, it (Sossner) is a good company, the facilities were proper, things required of the people having an interest in the business, if it was for sale, and we would like to look at it * * *

> One of the things that we talked about, and which probably would conclude our discussion that day, was that if we were to buy it, if he had an interest in purchasing it in a joint venture with us because we didn't have personnel or management to operate a company in the United States.* * * If he had cash involvement, which is one reason we asked him for was good faith, to see our interest was in us actually trying to acquire Sossner. We wanted to know how much cash he had available and if he was interested in a joint venture with us.* * * [The full probable purchase price would be] $2,000,000.* * * [Plaintiff had available for investment] $100,000.* * * He (plaintiff) would function as an Executive Officer" [Ex. C, pp. 16-18].

At the trial, Messrs. Osawa and Zoppelt tried to deprecate these pretrial statements by claiming that Mr. Zoppelt had no such authorization and only had the power to hir salesmen (R. 46z), and by claiming that the words "joint ventur were never used (R. 19z) and that there was no discussion regarding a possible investment by the plaintiff (R. 17z) or any discussion regarding the plaintiff being an Executive Officer of Sossner (R. 16z-17z) (R. 334-338).

These attempts by OSG's principal officers to minimize the importance and effect of the discussion on May 14, 1973 are neither commendable nor creditable.

Moreover, their credibility was substantially impaired when they denied receipt of plaintiff's "fiscal year 1973-74 forecast" for Sossner (Ex. 20) on May 14, 1973. Their claim of not having received or seen such document until someti in early June of 1973, is belied by Mr. Zoppelt's letter dated May 24, 1973 addressed to the plaintiff, wherein he states in pertinent part that:

> "We agree with you and believe that the OSG acquisition of Sossner could be very meaningful. Through our Japan production capabilities, ability to furnish automatic thread and flute grinders, etc., we can turn around and solve the problems you have outlined in your proposal in quick order and make this division a major factor in the US tap market. We believe that we are the only ones capable of doing it because no one has the additional production capability to immediately meet the Sossner need."

Ordinarily this paragraph, together with the correspondence between the parties and the testimony at the trial, might have led the Court to the firm conclusion that the plaintiff and OSG entered into and embarked upon a joint venture on May 14, 1973, and that when the defendant OSG perceived that it no longer needed the plaintiff to consummate its acquisition of Sossner it took such steps as were necessar to erode and finally destroy the relationship between them.

However, as defendant OSG points out, plaintiff's subsequent conduct was not completely consistent with his claim that he had made a joint venture agreement and that from and after May 14, 1973, he was a joint venturer with OSG. Specifically, OSG refers to

1) plaintiff's letter dated June 14, 1973 addressed to Mite in which he suggests that if the proposed deal were consummated he would be entitled to a finder's fee from Mite;

2) plaintiff's admission, when asked "what kind of deal I wanted to make" (R. 139), that he had "not specifically" (R. 140) previously discussed the provisions containe in Exhibit 14 and that he therein set forth concededly new provisions such as "pension plan", "Bonus based on profi "special arrangement"to defer plaintiff's making his investme etc. (R. 224-225);

3) plaintiff's failure to claim a violation of the alleged joint venture agreement when his proposal (Ex. 14) was rejected (R. 230);

4) plaintiff's reply, when asked on his EBT whether he "had a discussion about a finder's fee with them (OSG) before that (June 7, 1973)", that "No, my finder's fee was the fact I was going to go to work there and do exactly what I wanted, I guess, all the time" (EBT pp. 26-27);

5) plaintiff's attempt to negotiate an employment contract as Vice President in charge of Manufacturing and his apparent agreement to all the terms thereof with Messrs. Zoppelt and Demory except the duration thereof (R. 161); and

6) plaintiff's original complaint, which did not allege a joint venture agreement; such claim was first made in his answer to defendants' motion for summary judgment

As to paragraph 5, supra, plaintiff might well and justifiably argue that negotiations in an attempted settlement of a claim may not be said to be "inconsistent" with a claim such as this but that scarcely disposes of the other conduct specified by the defendant and outlined above.

While the foregoing raises serious questions as to whether a joint venture agreement existed under the five-pronge test enumerated in this Court's earlier opinion in this case, 401 F.Supp. at p. 1127, (see Yonofsky v. Wernick, 362 F.Supp. 1005, 1031-32 (S.D.N.Y. 1973)), it does not dispose of plaintiff's claim that he was asked by OSG to perform and provide work, labor and services in its acquisition of Sossner

and that, having performed the same, he is entitled to be compensated therefor on a quantum meruit basis.

In its opinion dated October 6, 1975, this Court held only that the writings between the parties were sufficient to meet and overcome the defense of the Statute of Frauds (N.Y. Gen. Oblig. Law Section 5-701). It did not hold as the defendant now suggests that the facts herein necessarily formed the basis for a contract implied-in-fact as opposed to a contract implied-in-law. Indeed the Court suggested a contract implied-in-law might well be inferred here to prevent defendants from "unjust enrichment".

Regardless of which it may be, however, plaintiff's damages would appear to be the same as hereinafter discussed.

Insofar as defendant OSG's liability for some damages is concerned, there is really no basis for dispute. At the meeting of May 14, 1973, OSG undeniably requested plaintiff to determine whether Sossner was for sale and in a latter dated May 24, 1973, addressed to the plaintiff, Mr. Zoppelt "thanked" him for (i) his letter of May 17th and (ii) "making the contact at Sossner," and stated that "we look forward to hearing the results of your discussion with him (Mr. Brancato of Sossner) on May 23 or 24."

In plaintiff's May 17th letter to OSG which, as indicated, was acknowledged "with thanks", plaintiff had written in pertinent part as follows:

> "It was a real pleasure to meet and discuss with you and Mr. Zoppelt the possibilities of acquiring Sossner Tool Divion [sic] by OSG.
>
> "As you know, I spoke to Mr. Leo Brancato, Executive Vice President of Mite Corporation on Monday, May 14, and told him that I had lined up a possible buyer for the Sossner Division but didn't reveal your company identity.
>
> "On Wednesday, May 16th, I spoke to Mr. Brancato again and told him that your company (OSG) was the interested party, after my phone conversation with Mr. Zoppelt on Tuesday afternoon, wherein he authorized me to act in your company's behalf.
>
> * * *
>
> "He did ask for your name and Mr. Zoppelt and I gave the names to him together with your address and telephone number. I imagine that he is going to draw a D & B on your company before he continues any possible negotiations.
>
> "I will keep in touch with Mr. Brancato and if I do not hear from him by Wednesday, May 23rd, I will phone him on Thursday, the 24th."

In the light of the foregoing and the testimony of the plaintiff and Mr. Zoppelt before and at the trial, it ill behooves the defendant OSG now to claim that "plaintiff was (merely) a volunteer and not entitled to compensation as a finder" or otherwise. Indeed such claim in the light of all the facts is unconscionable.

DAMAGES

This then leaves us with the question of damages. OSG says that under a "factually implied contract" an aggrieved party is entitled to recover only the reasonable value of his services, which it says were limited in plaintiff's case to two hours of work on May 14, 1973. OSG agrees on the other hand that if we are dealing here with a contract implied-in-law, or a "quasi-contract", the damages could be based on its own unjust enrichment.

While the facts here appear to present something of a hybrid situation, it would not seem to be necessary in this case at least to resolve this particular question by categorizing the Flammia-OSG agreement.

Even if it be assumed that plaintiff's recovery must be based on a contract implied-in-fact, the value of his services cannot properly be said to be the result of multiplying his hourly rate, based on his last salary, times his hours spent on this particular project.

When an eminent law professor who specializes in corporate tax matters teaches at a law school he gets paid at one rate, but when he is retained by a large corporate client to work on a particularly complex tax question he is normally compensated at a rate which bears no relationship to his so-called normal "hourly rate." So also in this case plaintiff's services must be valued and paid for on the basis of his worth, taking into consideration the skill, expertise, training and knowledge of the plaintiff, payments to others for comparable services, value of the service to OSG, etc.

In fact, the case most heavily relied on by defendants in this area, Robbins v. Frank Cooper Associates, 19 A.D.2d 242 (1st Dept. 1963), rev'd on other grounds, 14 N.Y.2d 913 (1964), itself does not support defendants' "hourly rate" theory. Robbins says that the measure of damages in cases of breached contracts implied-in-fact is the reasonable value of the services, and equates this value with "market value." As indicated above, market value of services varies with the nature of the work an expert does.

Further, no case called to our attention indicates that where services have been rendered, the market value of the services can never be identical to the enrichment worked by those services. Indeed, such market value would seem to be under normal circumstances, a logical measure of the enrichment. In fact, in the words of one New York authority:

> "Value of the services is stated to be the measure of recovery in an action for work, labor, and services, whether recovery is had on the basis of contract implied in fact, contract or promise implied by law, or quasi contract, and usually there is no objection to value as the measure of recovery since in most cases involving an implied in fact contract, and also in many cases involving a nonconsensual obligation, to pay for services, there is an equivalence between the value of the plaintiff's services and the value of the benefit conferred upon the defendant by such services." 50 N.Y.Jur., Restitution and Implied Contracts § 107 (footnote omitted).

Compare Naimoli v. Massa, 81 Misc. 2d 431 (City Ct. Geneva 1975), where certain expenses of the plaintiffs had not worked any benefit for the defendants.

To support his claims, plaintiff called an expert, Professor Aaron Warner, Dean of the Columbia School of General Studies, who holds an AB Degree from New York University, an LLB Degree from Harvard Law School and a PhD in economics from Columbia and who practiced law in Boston from 1933 to 1936 and then served as a lawyer and an administrat with the National Labor Relations Board, the Railroad Retirement Board and the Office of Price Administrator. After the war he served as Associate Professor at Harvard and thereafter as a full Professor at Columbia with his major fields of interest being economic theory, labor economics and industrial organization. He has also served in many cases a an arbitrator of labor disputes, as a consultant to Federal agencies, including the Department of Labor, the Maritime Administration and the Department of Commerce, as a consultant to the International Labor Organization at Geneva, Switzerland, and as an associate with an economic consulting firm which specializes in the evaluation of human services. He testified that his competency as a teacher includes the field of mergers and acquisitions and that he serves as a labor economist and an arbitrator.

Following a lengthy hypothetical question by plaintiff's attorney he testified that he had an opinion as to what the value of Mr. Flammia's statements and services were to the OSG Company, and he broke the same down into the following categories:

1. The fact that Mr. Flammia's services and statements avoided the need for a broker or finder in the transaction which, in his opinion, inured to the benefit of OSG in the amount of (5% on the 1st $1,000,000 and 4% on all in excess thereof)..... $90,000.00

2. The fact that Mr. Flammia revealed the price demanded of him by Mite for the purchase of Sossner (in the amount of)..... 30,000.00

3. The fact that Mr. Flammia transmitted knowledge to OSG that Sossner was for sale thereby eliminating any necessity for OSG to search for and find a suitable outlet on the East Coast for a company which met their requirements (in the amount of)..... 20,000.00

4. The fact that Mr. Flammia, who had considerable knowledge of the operations of the company, was willing to make a substantial investment therein, meant an elimination of considerable uncertainty for the buyer in evaluating the merits of the purchase price (in the amount of) 50,000.00

5. The fact that Mr. Flammia forfeited any opportunity he might have had to acquire shares in Sossner through other companies and suspended the operation of his own company for a period of time in reliance upon the proposed arrangement between OSG and himself..... (extremely valuable but value unknown)

In other words, Dean Warner placed a value on Mr. Flammia's services and statements to OSG of at least $190,000 and stated that in his opinion an additional value should be added for the so-called opportunity cost for Mr. Flammia, which he characterized as "extremely valuable".

Mr. Flammia testified that from August 1, 19 3 until November of 1973 he served as a consultant at a rate of approximately $150 per day and earned approximately $7200, an that in 1974 he had one consulting job which paid approximately $500. In addition, he testified that he had invested approximately $106,000 in his Pioneer company since November of 1973 and had been paid as a salary from that company in 1975 approximately $15,600.

Defendant OSG called Mr. Alan Sternlieb, Managing Director of the investment banking firm of Lehman Brothers, who has "spent a good deal of time in the area of mergers and acquisitions" (R. p. 6), and who testified that he was familiar with the fees customarily paid to persons or firms who assist principals in such transactions. Following a lengthy hypothetical he stated that in his opinion the value of the services rendered by the plaintiff in connection with the acquisition of Sossner by OSG from Mite was "in the ballpark, twenty to twenty-five thousand".

Mr. Sternlieb appears to have based this opinion upon the type and amount of work which Lehman Brothers would render to a seller such as Mite in a transaction of this size. For such he testified his firm would receive a fee in the neighborhood of $90,000. He reduced such fee to the twenty to twenty-five thousand figure based upon his opinion of the services rendered by the plaintiff.

This Court cannot escape the impression, however, that Mr. Sternlieb's estimate discounted much that should be due to plaintiff because the members of his firm would have been required to do, and would have performed, various work and services to educate themselves to the level of knowledge and expertise that plaintiff had already attained by working for so many years in the industry, where plaintiff of course did not have to perform these tasks. Moreover, in this particular case it is indisputable that plaintiff had special knowledge of certain facts such as the minimum price for which Sossner could be bought and that Sossner was available for sale In addition, plaintiff's good faith and confidence in the deal and his opinion that Sossner was such a good acquisition was manifested by the fact that he, the plaintiff, was willing to invest his own money in the same, and this confidence considered with his expertise was helpful to OSG.

Notwithstanding Mr. Sternlieb's doubts with respect thereto, all these factors unquestionably had some value as Professor Warner pointed out.

In any event, plaintiff may not be said to have been an ordinary "finder". His lifetime experience in and knowledge of the industry and, in particular, of the Sossner company which OSG sought to acquire, his prior dealings with the management of Sossner, and his intimate knowledge of Sossner's strengths and weaknesses were not facts and details which could have been unearthed, set forth and relied upon by an

interested purchaser no matter how diligent the services of a prominent investment banking firm such as Lehman Brothers. In other words, plaintiff's knowledge and expertise in this particular matter were unique, were relied upon by the defendants and were of considerably more value than the service which might ordinarily be performed even by such a reputable, well-known firm engaged in the finder business as Lehman Brothers.

Thus the Court concludes that the plaintiff's service were worth substantially more than the value attributed to them by Mr. Sternlieb and indeed were more valuable to a potential buyer such as OSG than the services of the normal finder in a transaction of this kind. Accordingly, the Court finds that on either quantum meruit theory the plaintiff is entitled to recover from OSG damages in the sum of $130,000.

At the conclusion of the trial the parties agreed that the plaintiff's complaint against Mite should be dismissed with prejudice but without costs or disbursements.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

605A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
JUL 16 1976
A.M.
P.M.

G. T. FLAMMIA,

Plaintiff,

- against -

MITE CORPORATION and O.S.G. TAP AND DIE, INC.,

Defendants.

JUDGMENT

73 C 1571

A memorandum and order of Honorable Thomas C. Platt, United States District Judge, having been filed on July 15, 1976, containing findings of fact and conclusions of law, awarding plaintiff damages in the sum of $130,000 to be recovered from O.S.G. Tap and Die, Inc. and dismissing the complaint against defendant Mite Corporation, with prejudice but without costs or disbursements, it is

ORDERED and ADJUDGED that the plaintiff recover damages in the sum of $130,000 from O.S.G. Tap and Die, Inc., and that the complaint against defendant Mite Corporation is dismissed with prejudice but without costs or disbursements.

Dated: Brooklyn, New York
July 16, 1976

Lewis Orgel
Clerk

606A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

G. T. FLAMMIA, :

Plaintiff, : Index No. 73 C 1571

-against- : NOTICE OF APPEAL

MITE CORPORATION and O.S.G. TAP AND DIE, INC., :

Defendants. :

- -x

S I R S:

PLEASE TAKE NOTICE that the Defendant O.S.G. Tap and Die, Inc. hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment after trial, dated July 16, 1976, and entered in the Office of the Clerk of the United States District Court for the Eastern District of New York on July 16, 1976, in the sum of $130,000 in favor of the plaintiff against defendant O.S.G. Tap and Die, Inc.; and the defendant hereby appeals from each and every part thereof, except that part which dismisses the complaint as to the defendant Mite Corporation.

Dated: New York, New York
August 16, 1976

CLEARY, GOTTLIEB, STEEN & HAMILTON

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Eastern District of New York

Copy Red.
Plaintiff's Ex.